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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1932

## No. 466

ESTHER JACKSON PORTER, AS EXECUTRIX, AND RICHARD L. DAVISSON, AS SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM H. PORTER, DECEASED, PETITIONERS,

*vs.*

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1932

CERTIORARI GRANTED NOVEMBER 14, 1932

(37,163)

# (37,163)

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INDEX


| | Original | Print |
|---|---|---|
| Proceedings before United States Board of Tax Appeals | 1 | 1 |
| Docket entries | 1 | 1 |
| Petition | 4 | 2 |
| Exhibit "A"—Notice of deficiency | 18 | 10 |
| Exhibit "B"—Trust agreement of October 18, 1918 | 23 | 13 |
| Exhibit "C"—Trust agreement of February 1, 1919 | 34 | 20 |
| Exhibits "D," "E," "F"—Instruments modifying trusts, November 27, 1926 | 46 | 28 |
| Answer | 61 | 37 |
| Amendment to answer | 63 | 38 |
| Reply to amendment to answer | 65 | 39 |
| Amendment to petition | 69 | 41 |
| Answer to amendment to the petition | 72 | 42 |
| Findings of fact and opinion, Black, M | 74 | 43 |
| Dissenting opinion, Seawell, M | 95 | 56 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 21, 1932

| | Original | Print |
|---|---|---|
| Dissenting opinion, Matthews, M | 102 | 61 |
| Order of final determination | 105 | 63 |
| Notice of filing petition for review | 107 | 63 |
| Petition for review | 109 | 64 |
| Statement of evidence | 124 | 72 |
| Appearances | 124 | 72 |
| Motion to amend answer | 125 | 73 |
| Reply to amendment to answer | 126 | 73 |
| Amendments to petition | 127 | 74 |
| Testimony of Primus E. Godrich | 129 | 73 |
| Testimony of Richard L. Davisson | 140 | 82 |
| Stipulation as to certain facts | 140 | 82 |
| Order approving statement of evidence | 144 | 85 |
| Petitioners' Exhibits 1 to 6—Correspondence | 145 | 85 |
| Respondent's Exhibit A—Trust indenture, dated October 18, 1918 | 156 | 91 |
| Respondent's Exhibit B—Trust indenture, dated June 27, 1919 | 168 | 98 |
| Respondent's Exhibit C—Letter, dated September 29, 1928 | 179 | 105 |
| Præcipe for transcript of record | 185 | 109 |
| Clerk's certificate (omitted in printing) | 188 | |
| Proceedings in United States circuit court of appeals, second circuit | 189 | 111 |
| Opinion, Hand, J. | 189 | 111 |
| Judgment | 192 | 116 |
| Clerk's certificate (omitted in printing) | 194 | |
| Order allowing certiorari | 195 | 117 |

[fols. a & 1]

## BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 42815

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor of the Estate of William H. Porter, Deceased,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

For Taxpayer: Richard L. Davisson, Edw. N. Perkins.
For Commissioner: L. S. Pendleton, F. Schlosser.
Tran-ferred to Mr. Black 6-5-31.

DOCKET ENTRIES

1929.

Feb. 20. Petition received and filed. Taxpayer notified. (Fee paid.)
" 21. Copy of petition served on General Counsel.
Apr. 8. Answer filed by General Counsel.
" 9. Copy of answer served on taxpayer. General Calendar.

[fol. 2]

1930.

Aug. 20. Hearing set October 30, 1930.
Oct. 30. Hearing had before Herbert F. Seawell, Div. 4, on merits. Submitted. Briefs due December 15, 1930. Amendment to the answer filed.
Nov. 4. Transcript of hearing of October 30, 1930, filed.
" 8. Amendment to the petition filed by taxpayer.
" 8. Reply to the amendment to the answer filed by taxpayer.
" 17. Answer to the amendment to the petition filed by General Counsel. 11-19-30 copy served.
" 30. Stipulation of facts filed.
Dec. 4. Stipulation of facts filed.
" 13. Brief filed by General Counsel.
" 15. Brief filed by taxpayer.

1931.

June 30. Findings of fact and opinion rendered, Eugene Black, Div. 15. Decision will be entered under Rule 50.

July 8. Notice of settlement filed by General Counsel.

" 11. Hearing set July 29, 1931, on settlement.

" 22. Computation of deficiency filed by taxpayer.

" 25. Computation of deficiency filed by General Counsel. 7-27-31 copy served.

" 29. Hearing had before Mr. Smith on settlement under Rule 50. Referred to Mr. Black for order.

[fol. 3]

July 30. Order of final determination entered, Charles P. Smith, Div. 5.

1932.

Jan. 22. Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

" 22. Proof of service filed.

" 22. Notice of the appearance of Edward N. Perkins as counsel for taxpayer.

Feb. 9. Præcipe filed—proof of service thereon.

" 16. Agreed statement of evidence lodged.

" 17. Agreed statement of evidence approved and filed.

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[fol. 4] Before United States Board of Tax Appeals

[Title omitted]

Petition—Filed February 20, 1929

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated December 22, 1928, and bearing the symbols JEK-4896-1st, N. Y., and as a basis of the proceeding allege, as follows:

1. The petitioner, Esther Jackson Porter, is an individual residing at Lattingtown Road, Glen Cove, Nassau County, New York. The petitioner, Richard L. Davisson, is an individual residing at 440 Park Avenue, Borough of

Manhattan, City of New York. Letters Testamentary under the Last Will and Testament of William H. Porter, deceased, who at the time of his death was a resident of the [fol. 5] City of Glen Cove, County of Nassau, State of New York, were granted to your petitioners by the Surrogate's Court of the County of Nassau, State of New York, on the 29th day of December, 1926, and your petitioners are now the duly qualified and acting Executors of the Last Will and Testament of said deceased.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioners on or about December 22, 1928.

3. The tax in controversy is a deficiency in the Federal Estate Tax assessed against the Estate of William H. Porter, deceased, in the sum of $103,768.22.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors made by the respondent:

(a) The inclusion by the respondent of the value of the transfer in trust alleged to have been created on November 27, 1926, and amounting (less the exemption) to $211,125.00 in ascertaining the decedent's gross estate for Federal Estate Tax purposes.

(b) The refusal of the respondent to allow as proper deductions as debts of the decedent the amounts paid by the Executors on account of pledges signed and obligations incurred by the decedent in favor of various charitable and [fol. 6] educational institutions for the reason that they were not deemed by the respondent obligations contracted for a consideration in money or money's worth.

(c) The error of the respondent in not allowing full credit for taxes actually paid as State Inheritance Taxes, as allowed in the Commissioner's letter, dated September 29, 1928.

5. The facts upon which the petitioners rely as a basis for this proceeding are as follows:

As to Paragraph 4a

The Transfer in Trust

(a) Upon information and belief that on or about October 18, 1918, the decedent executed a trust agreement with

Bankers Trust Company, as Trustee, dated October 18, 1918 (hereinafter called Trust No. 1) a copy of which is annexed hereto and marked "Exhibit B," the principal beneficiary of which was the decedent's daughter, Helen Porter Davisson. The trust provided in part that Helen Porter Davisson was to receive the income therefrom until attaining the age of thirty years, and on attaining such age she was to receive the principal thereof. In the event of her death before attaining the age of thirty years the principal was to be held in trust for the benefit of her child Richard L. Davisson, Jr. At that time Helen Porter [fol. 7] Davisson had no other children. The deed of trust provided that the decedent was to deliver to the Trustee the following securities:

$50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued for rapid transit construction.

$50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued to provide for supply of water,

and these securities were in fact delivered to the Trustee on or about the date of the instrument, to be held pursuant to the terms thereof.

(b) Upon information and belief that on or about the 1st day of February, 1919, a second deed of trust, dated February 1, 1919, was executed between Bankers Trust Company, as Trustee, and the decedent (hereinafter called Trust No. 2), a copy of which is hereto annexed and marked "Exhibit C," the principal beneficiary of which was the decedent's daughter, Helen Porter Davisson. This trust provided in part that Helen Porter Davisson was to receive the income therefrom until she attained the age of forty years and when she attained the age of forty years she was to receive the principal, and in the event of her death before attaining the age of forty years the principal thereof was to be held in trust for the benefit of her child [fol. 8] Richard L. Davisson, Jr. At that time Helen Porter Davisson had no other children. The deed of trust provided that the donor was to deliver to the Trustee the following securities:

$100,000 Corporate Stock of the City of New York for the construction of rapid transit railroads, dated December 4, 1918, bearing interest at 4½% per annum, principal due June 1, 1965,

and these securities were in fact delivered to the Trustee on or about the date of the instrument.

(c) Both of the above mentioned deeds of trust contained the following provision:

"Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing, executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York), delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part [fol. 9] of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned."

(d) The intent and motive of the decedent in creating the two trusts above mentioned was to provide a separate income for his daughter, Helen Porter Davisson, and said trusts were not made in contemplation of death. Said trusts were made more than seven years before the death of decedent.

(e) Subsequently to the execution of the two above mentioned deeds of trust, and prior to any modification thereof, [fol. 10] two more children, John Davisson and William Porter Davisson, were born to said Helen Porter Davisson.

(f) On or about November 27, 1926, the decedent, pursuant to the right reserved in paragraph "Tenth" in each of said two trusts (Exhibits B and C) modified said trusts by executing and delivering to Bankers Trust Company simultaneously three instruments, copies of which are annexed hereto and marked "Exhibit D", "Exhibit E" and Exhibit F", all dated November 27, 1926.

(g) The only changes in said Trust No. 1, dated October 18, 1918, and Trust No. 2, dated February 1, 1919, effected by the above-mentioned instruments of modification dated November 27, 1926, were as follows:

(1) The payment of the principal of Trust No. 1 to Helen Porter Davisson was postponed from the age of thirty to the age of forty.

(2) In case of the death of Helen Porter Davisson before the age of forty, the instruments of modification provided that the principal of both trust funds should be divided into as many equal shares as she shall leave children her surviving and deceased children who leave issue her surviving, and directed the application of said shares for the benefit [fol. 11] of said parties. This provision permitted the two children of Helen Porter Davisson, namely, Joan and William, born subsequently to the execution of the original trust indentures (Exhibits B and C) and prior to the execution of the instruments of modification on November 27, 1926, to share in the principal of the trust funds equally with their elder brother, Richard L. Davisson, Jr., who alone was mentioned as the contingent remainderman in the original deeds of trust.

(h) Upon information and belief that at the date of the modification of the said deeds of trust, namely, November 27, 1926, neither the decedent nor his physicians nor his family had any anticipation or expectation that his death would occur soon thereafter and there was no reason to believe or anticipate that the decedent did not have many years of life ahead of him.

(i) After the original delivery in 1918 and 1919 of the securities constituting the principal of the two above men-

tioned trusts to Bankers Trust Company, as Trustee, said securities never left the possession of said Bankers Trust Company as said Trustee, and are still held by said Trustee, under the terms of said Trust Agreements as modified as aforesaid. After the original delivery of said securities to said Trustee in 1918 and 1919, neither said decedent nor his estate has at any time had legal title to or any beneficial interest in said securities or in the proceeds thereof or income therefrom.

[fol. 12] (j) There was no transfer from the decedent or from the decedent's estate on November 27, 1926, of the securities constituting the principal of the above mentioned trusts. The only transfers from the decedent of said securities or any interest therein were the original transfers of 1918 and 1919.

(k) No power was reserved to the decedent in the two said deeds of trust (Exhibits B and C) above mentioned to revoke the same or any part thereof, and no action taken by the decedent, either alone or in conjunction with the trustee or others could legally effect the revocation thereof. No power was reserved to the decedent in said two deeds of trust (Exhibits B and C) to revest in himself or his estate any right, title or interest in the securities constituting the principal or income of said trusts and no action taken by the decedent, either alone or in conjunction with others could accomplish such an object.

(l) The petitioners allege that the only legal effect of the instruments dated November 27, 1926, above mentioned, was a modification of Trust No. 1, dated October 18, 1918, and Trust No. 2, dated February 1, 1919, pursuant to paragraph "Tenth" contained in each of said agreements, which modification in no way effected a transfer of interest to or from the decedent or his estate.

[fol. 13] As to Paragraph 4-B

Payments made by the executors to charitable and educational institutions pursuant to pledges made by decedent during his lifetime for which no deduction was allowed by respondent in computing the value of the decedent's net estate for Federal estate tax purposes

(m) On May 12, 1927, payment was made to James W. Townsend of the sum of $6,000. as the balance of a written

subscription or pledge of $12,000. made by decedent during his lifetime to the New North Country Community Hospital at Glen Cove, Long Island. This subscription was made by decedent for the specific purpose of equipping an X-Ray room in the said hospital as a memorial to decedent's son who lost his life in the World War. Upon information and belief, during the decedent's lifetime the construction of the said hospital was actually undertaken and an X-ray room was provided for therein in reliance on said promise.

(n) On May 12, 1927, there was paid to Princetown University the sum of $5,000. as the balance of a subscription of $25,000 made by decedent during his lifetime for the purpose of erecting in the University Chapel to be built at Princeton, New Jersey, a bay containing a Memorial Window in memory of decedent's son who lost his life in the [fol. 14] World War. Upon information and belief, Princeton University had procured drawings and sketches of such bay and window to be made and had actually contracted for and commenced construction of the same during decedent's lifetime in reliance on said subscription.

(o) On May 27, 1927, petitioners paid to the Boy Scouts of Nassau County the sum of $1,000 in payment of a subscription made by decedent on June 28, 1926, for the purpose of purchasing a 600 acre camp in Nassau County for the Boy Scouts of that County. Upon information and belief, an option on the said camp site expiring July 1, 1926, was exercised and the land purchased by the Boy Scouts of Nassau County during the decedent's lifetime, and in reliance on the subscriptions of decedent and others.

(p) On May 12, 1927, petitioners paid to the Hampton Tuskegee Endowment Fund the sum of $500. as the balance of a written subscription of $1,000. to this fund made by decedent during his lifetime. Upon information and belief that this subscription was made in order that the terms of a conditional subscription, conditioned upon a certain amount being raised, might be complied with; that as a result of the subscription of decedent and those of others, the fund was raised and the terms of the conditional subscrip-

tion were met, and the amount of the conditional subscrip-
[fol. 15] tion was paid, all during the lifetime of decedent.

(q) On May 27, 1927, petitioners paid to the Nassau Hospital Association the sum of $500 in payment of a pledge made by decedent on October 26, 1926, to a fund for the building of the new Nurses Home for the Hospital. Upon information and belief, the construction of the said Nurses Home was undertaken by the Hospital and subsequently completed, in reliance upon the subscriptions of decedent and others.

(r) On May 27, 1927, petitioners paid the Civic Forum of New York City the sum of $25.00 on account of the written agreement made by decedent during his lifetime to underwrite the cost of meetings of the Civic Forum during the season of 1926-1927. Upon information and belief that in reliance upon the undertakings of decedent and others, various meetings were held during the said season resulting in a deficit at the end thereof of which the proportion assumed by decedent amounted to the sum of $25.00.

No deduction of any part of the aforesaid sums, paid by petitioners and aggregating $13,025.00 has been allowed by respondent in computing the value of the net estate of the decedent for estate tax purposes.

[fol. 16] As to Paragraph 4-C

Credit for State Inheritance Taxes

(s) Attached to the notice of deficiency from the Commissioner of Internal Revenue dated December 22, 1928, was a statement consisting of two pages as set forth in the copy of said notice attached hereto and marked Exhibit A. On the second page of such statement there is set forth a computation of the amount proposed for assessment in which statement allowance is made for "Credit for State Inheritance Taxes" in the sum of $226,815.16. The actual amount paid by petitioners for State Inheritance Taxes and allowed by the Commissioner of Internal Revenue in a letter to petitioners dated September 29, 1928, was $226,855.16 and this amount should have been set forth on the said statement in lieu of the amount above stated.

(t) The foregoing sum does not include the amount of $750,000.00 paid by the petitioners on account of the New York Estate Tax for which no credit has been given by the respondent because the New York State Tax Commission refuses to finally determine the amount of the tax until the amount of the Federal Estate Tax has been finally determined.

Wherefore petitioners pray that this Board may hear and re-determine the deficiency alleged in accordance with the foregoing.

Dated February 19th, 1929.

(Sgd.) Richard L. Davisson, Counsel for Petitioners. Office and Post Office address: 128 Broadway, New York City.

[fol. 17] *Duly sworn to by Richard L. Davisson. Jurat omitted in printing.*

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[fol. 18] EXHIBIT A TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

MT-ET-C1.-4896-JEK.
District of: 1st New York.
Estate of: William H. Porter.
Date of death: November 30, 1926.

Dec. 22, 1928.

Richard L. Davisson et al., executors, estate of William H. Porter, 128 Broadway, New York, New York.

SIRS: The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of September 29, 1928. The deficiency hereby determined amounts to $103,768.22, and is fully explained in the attached statement, consisting of two pages, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the six-[fol. 19] tieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination

of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said Board within the 60 day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver [fol. 20] should be executed with respect to the amount of the deficiency to which you agree.

Respectfully, (Signed) H. D. Mires, Acting Commissioner.

Enclosures: Statement, Waiver—Form 890.
CLE.

MT-ET-C1-4896-JEK-1st New York.
Estate of William H. Porter.

The estate's protest arises in connection with the following items:

| | Gross Estate | | |
|---|---|---|---|
| Stocks and bonds | Returned | Tentatively determined | Determined |
| Stocks: | | | |
| Item 27 | $0.00 | $3,000.00 | $0.00 |
| Transfers: | | | |
| Transfer in trust made October 18, 1918 | 0.00 | 107,500.00 | 0.00 |
| Transfer in trust made February 1, 1919 | 0.00 | 108,625.00 | 0.00 |
| Transfer in trust made November 27, 1926 | 0.00 | 216,125.00 | 211,125.00 |

| | | | |
|---|---|---|---|
| **Deductions** | | | |
| Funeral expenses | 160,902.74 | 130,198.74 | 158,420.71 |
| Miscellaneous administration expenses | 57,509.05 | 26,826.18 | 33,677.53 |
| Debts of decedent | 1,196,602.76 | 1,022,766.82 | 1,143,600.06 |

After a careful consideration of all the evidence on file in this case it appears that the preferred stock of the Gen- [fol. 21] eral Heating Corporation of America was without value at the date of decedent's death and adjustment has accordingly been made.

It has been determined by the Bureau that the transfers made by way of trusts created by decedent on October 18, 1918 and February 1, 1919, are not taxable as part of his estate and proper adjustment has herein been made. However, the trust created November 27, 1926, is under Section 302(c) of the Revenue Act of 1926, part of decedent's estate for estate tax purposes and no adjustment is warranted in the tentative determination, except the allowance of an exemption of $5,000.00 in the value determined for the trust property. The value of this trust is, therefore, $211,125.00, as indicated above.

Evidence having been presented showing the payment of additional funeral expenses and miscellaneous administration expenses, the adjustments warranted have herein been made.

Under "Debts of decedent" deduction is allowed for the items which the evidence discloses constituted proper obligations against the decedent's estate. Under this caption no allowance has been made for the amounts claimed for pledges made by the decedent. These are not deemed obligations contracted for a consideration in money or money's worth.

The following computation shows the estate tax liability of this estate which is hereby made final:

[fol. 22]

| | Returned | Tentatively determined | Determined |
|---|---|---|---|
| Gross estate | $11,796,856.34 | $12,238,155.05 | $12,014,030.05 |
| Deductions | 2,491,310.26 | 2,006,428.88 | 2,162,335.44 |
| Net estate | 9,305,546.08 | 10,231,726.17 | 9,851,694.61 |
| Tax liability | 1,221,553.76 | 1,390,845.23 | 1,325,321.98 |
| Deficiency | ..... | 178,291.47 | 103,768.22 |
| Tax liability | | 1,325,321.98 | |
| Credit for State inheritance taxes | | 226,815.16 | |
| Tax less credit | | 1,098,506.82 | |
| Returned tax due | | 994,738.60 | |
| Amount proposed for assessment | | 103,768.22 | |

The amount proposed for assessment will bear interest at the rate of six per centum per annum from one year after date of decedent's death to the date of assessment or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

Any amount of unpaid returned tax bears interest at the rate of one per centum a month from one year after the date of decedent's death until payment is received by the Collector of Internal Revenue at Brooklyn, New York.

CLE.

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[fol. 23] EXHIBIT B TO PETITION

Bankers Trust Company, New York

(Federal Estate Tax Return)

Supporting Schedule "E"

Helen Porter Davisson Trust No. 1

This indenture made the 18th day of October, 1918, between William H. Porter, of Glen Cove, Nassau County, New York, party of the first part (hereinafter called the "Donor") and Bankers Trust Company, a corporation of the State of New York, having its principal offices in the Borough of Manhattan, City and State of New York, party of the second part, (hereinafter called the "Trustee").

Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned.

Now, Therefore, this Indenture Witnesseth, That in consideration of the premises, the mutual covenants herein contained, and of other good and valuable considerations, and of the sum of One Dollar ($1.00) to him in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Donor has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assign, [fol. 24] set over and deliver unto said Trustee its successors and assigns the following described property and securities, to wit:

$50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued for rapid transit construction

$50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued to provide for supply of water

Together with the appurtenances, and all the estate and rights of the Donor.

To have and to hold all and singular the above granted and described property and securities unto said Trustee, its successors and assigns, in trust, nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

First. To receive, hold, manage, sell, invest and reinvest the same and every part thereof, in the manner hereinafter specified and to collect, recover and receive the rents, issues, interest, income and profits thereof, and after deducting the commissions of the Trustee as hereinafter provided, and the proper and necessary expenses in connection with the administration of the trust, to pay over the balance thereof, hereinafter called "Income," unto Helen Porter [fol. 25] Davisson, the daughter of the Donor, until she shall attain the age of thirty years, and thereupon to convey, transfer and pay over to her, the said Helen Porter Davisson, the principal of this trust for her own use absolutely and forever.

In case of the death of said Helen Porter Davisson before she shall attain the age of thirty years, then upon her death to continue the trust for the benefit of her son, Richard L. Davisson, Jr., and during his minority to apply such amount of income for the maintenance, education and support of said Richard L. Davisson, Jr., as in the judgment of his father Richard L. Davisson may be necessary, and to accumulate the balance during minority, and upon the said Richard L. Davisson, Jr., attaining his majority to pay over to him the accumulation of income, if any, and thereafter the income upon the trust until he shall attain the age of thirty years, at which time to convey, transfer and pay over the principal of the trust to said Richard L. Davisson, Jr., for his own use absolutely and forever.

In case of the death of Richard L. Davisson, Jr., before he shall attain the age of thirty years (but only in the event of the death of Helen Porter Davisson before she shall attain the age of thirty years), to convey, transfer and pay over one fourth of the principal of the trust to Richard L. Davisson, if then living, and the balance thereof or the entire principal of the trust, if said Richard L. Davisson shall not then be living, to the issue of said Richard L. Davisson, Jr., in equal shares, and in default of issue surviving said Richard L. Davisson, Jr., then such balance [fol. 26] thereof or the entire principal of the trust if said Richard L. Davisson shall not then be living, to James J. Porter, son of the Donor, for his own use, and in case of his prior death in equal shares to the issue of said James J. Porter then living.

Second. The Trustee is authorized and empowered to retain, subject to the provisions hereof, any and all of the securities hereinbefore described in their present form, and also such additional properties as the Donor may from time to time add to the trust estate.

All investments or reinvestments made by the Trustee shall be subject to the control and written directions of the Donor during his lifetime, and the Trustee shall be fully protected in making any sale, investment or reinvestment as shall be directed by the Donor in writing during his lifetime and shall not be liable in any way for depreciation or loss incurred by reason of such sale, investment or reinvestment.

In the absence of any such written directions from the Donor, the Trustee shall be authorized to make such sales, investments or reinvestments as to the Trustee may seem proper and to the advantage of the estate, without regard to the investments prescribed by the laws of the State of New York for legal trust investments.

Upon the death of the Donor all investments or reinvestments shall be left to the discretion and judgment of the Trustee, with full power and authority to retain any and all securities constituting the principal of the trust fund, [fol. 27] and all further sales, investments or reinvestments shall be subject only to the control and discretion of the Trustee, and the Trustee shall not necessarily be limited to those securities prescribed by the laws of the State of New York for legal trust investments.

Subject to the limitations above prescribed, the Trustee shall have full power to sell and transfer any and all of said securities or any other property, real or personal, that may be taken under the terms of the trust, and to execute and deliver sufficient assignments, releases or satisfactions of bonds and mortgages, or other securities, or to sell and convey any real estate forming part of the trust estate and to execute, acknowledge and deliver good and sufficient deed or deeds of conveyance therefor.

No purchaser upon any sale by the Trustee shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the validity, expediency or propriety of any such sale.

Third. In any case in which the Trustee is required, pursuant to the provisions of this indenture to divide the principal of the trust estate into parts or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind, or partly in kind and partly money, and for the purpose of such allotment the judgment of the Trustee concerning the propriety thereof, and the relative value for the purpose of division or distribution of the property and securities [fol. 28] so allotted, shall be binding and conclusive on all persons and corporations interested therein.

Fourth. Subject to the limitations above prescribed the Trustee is authorized and empowered to vote in person or by proxy upon all stocks or other securities held by it; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at such times and upon such terms and conditions as the Trustee shall deem proper, to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation, or to the lease by any person or corporation of his or its property or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities

of any corporation, and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds or other investments held by the Trustee hereunder all rights, powers and privileges as are or may be lawfully [fol. 29] exercised by any person owning similar property in his own right provided, however, that the Trustee shall not be required to make any of the payments herein provided, except from the principal of the trust fund, or from funds furnished from the principal of the trust fund, or from funds furnished for that purpose by the Donor.

In the event that the Trustee shall request from the Donor written instructions as to the action which it shall take in regard to any of the matters set forth in this paragraph, and the Donor shall neglect or refuse to furnish such instructions for a period of ten (10) days, or in the event that the Donor shall be unable for any reason to furnish such instructions, the Trustee is hereby authorized and empowered to take such action in regard to such matters as it may deem proper and desirable.

The Donor hereby expressly reserves to himself the privilege of increasing the principal of the trust estate, at any time by adding thereto personal property and securities which the Trustee shall receive, hold, manage, sell, invest and reinvest in the same manner as hereinbefore specified in respect of the securities forming part of the original fund.

Fifth. The Trustee may in its sole discretion cause the securities which may from time to time comprise the trust fund, or any part thereof, to be registered in its name as Trustee hereunder, or in its own name, or in the name of its nominee, or to take and keep the same unregistered, and [fol. 30] to retain them or any part thereof, in such condition that they will pass by delivery.

Sixth. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust, a commission of one per cent. (1%) per annum upon income,

and is hereby authorized to deduct such commission before paying the income to the beneficiary hereunder.

The Trustee also shall be entitled to a commission of one per cent. (1%) upon the market value of the trust fund when and as the trust shall terminate upon the death of the beneficiary above named.

The Trustee is also authorized, in the discharge of its duties, to employ counsel and agents and to determine and pay to them reasonable compensation, and it shall be entitled to reimbursement for the same, and for such other expenses and charges as it may deem necessary and proper to incur.

Seventh. The Donor covenants and agrees to make, execute and deliver in due form of law such other and further assignments, conveyances or other instruments as the Trustee may deem requisite or necessary to effectuate the purposes hereof.

Eighth. The Trustee is further authorized and empowered to pay out of the income received from the trust fund any and all taxes which properly may become payable from time to time, under the laws of the United States, or of any [fol. 31] State, County or Municipality on said trust property, or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

Ninth. In case of securities taken or purchased for said trust fund at a premium, the Trustee shall not be bound to set aside any part of the income thereof as a sinking fund to retire or absorb such premium.

Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration

said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instru- [fol. 32] ments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned.

Eleventh. The Trustee by joining in the execution of this instrument, signifies its acceptance of the trust.

Twelfth. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by a Vice-President, [fol. 33] and its corporate seal to be hereunto affixed and attested by an Assistant Secretary as of the day and year first above written.

Wm. H. Porter. (Seal.) Signed, sealed and delivered in the presence of T. F. Mallaby. Bankers Trust Company, by F. N. B. Close, Vice-President. Attest: —— ——, Assistant Treasurer.

State of New York,
County of New York, ss:

On this 18th day of October, 1918, before me personally came William H. Porter, to me known and known to me

to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

Wm. A. Merrick, Notary Public. Kings County, N. Y. Ctf. No. 68. Certificate filed in New York County No. 132. Register's Office N. Y. County Ctf. No. 10145. Register's Office Kings County N. Y. Ctf. No. 160.

[fol. 34] State of New York,
County of New York, ss:

On this 18th day of October, 1918, before me personally came F. N. B. Close, to me known, who, being by me duly sworn, did depose and say that he resides at Cranford, N. J.; that he is a Vice-President of Bankers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

J. F. Grodley, Notary Public, etc.

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Exhibit C to Petition

Bankers Trust Company, New York

Supporting Schedule "E"

Helen Porter Davisson Trust No. 2

(Federal Estate Tax)

This Indenture made the 1st day of February, 1919, between William H. Porter, of Glen Cove, Nassau County, [fol. 35] New York, party of the first part (hereinafter called the "Donor"), and Bankers Trust Company, a corporation of the State of New York, having its principal offices in the Borough of Manhattan, City and State of New York, party of the second part, (hereinafter called the "Trustee").

Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned,

Now, therefore, this indenture witnesseth, That in consideration of the premises, the mutual covenants herein contained, and of other good and valuable considerations, and of the sum of One Dollar ($1.00) to him in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Donor has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assigns, set over and deliver unto said Trustee, its successors and assigns, the following described property and securities, to wit:

$100,000 Corporate Stock of the City of New York for the construction of rapid transit railroads, dated December 4, 1918, bearing interest at 4½% per annum, principal due June 1, 1965.

Together with the appurtenances, and all the estate and rights of the Donor.

[fol. 36] To have and to hold all and singular the above granted and described property and securities unto said Trustee, its successors and assigns, in trust nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

First. To receive, hold, manage, sell, invest and reinvest the same and every part thereof, in the manner hereinafter specified, and to collect, recover and receive the rents, issues, interest, income and profits thereof, and after deducting the commissions of the Trustee as hereinafter provided, and the proper and necessary expenses in connection with the administration of the trust, to pay over the balance thereof, hereinafter called "Income," unto Helen Porter Davisson, the daughter of the Donor, semi-annually, until she shall attain the age of forty years, and thereupon to convey, transfer and pay over to her, the said Helen Porter Davisson, the principal of this trust for her own use absolutely and forever.

In case of the death of said Helen Porter Davisson before she shall attain the age of forty years, then upon her death to continue the trust for the benefit of her son, Rich-

ard L. Davisson, Jr., and during his minority to apply such amount of income for the maintenance, education and support of said Richard L. Davisson, Jr., as in the judgment of his father Richard L. Davisson may be necessary, and to accumulate the balance during minority, and upon the [fol. 37] said Richard L. Davisson, Jr., attaining his majority to pay over to him the accumulation of income, if any, and thereafter the income upon the trust until he shall attain the age of thirty years, at which time to convey, transfer and pay over the principal of the trust to said Richard L. Davisson, Jr., for his own use absolutely and forever.

In case of the death of Richard L. Davisson, Jr., before he shall attain the age of thirty years (but only in the event of the death of Helen Porter Davisson before she shall attain the age of forty years), to convey, transfer and pay over one-fourth of the principal of the trust to Richard L. Davisson, if then living, and the balance thereof or the entire principal of the trust, if said Richard L. Davisson shall not then be living, to the issue of said Richard L. Davisson, Jr., in equal shares, and in default of issue surviving said Richard L. Davisson, Jr., then such balance thereof or the entire principal of the trust, if said Richard L. Davisson shall not then be living, in equal shares to the children of Helen Porter Davisson then living, if any there be, and in default of children, then to Jane Hetherington Porter for her own use.

Second. The Trustee is authorized and empowered to retain, subject to the provisions hereof, any and all of the securities hereinbefore described in their present form, and also such additional properties as the Donor may from time to time add to the trust estate.

All investments or reinvestments made by the Trustee [fol. 38] shall be subject to the control and written directions of the Donor during his lifetime, and the Trustee shall be fully protected in making any sale, investment or reinvestment as shall be directed by the Donor in writing during his lifetime and shall not be liable in any way for depreciation or loss incurred by reason of such sale, investment or reinvestment.

In the absence of any such written directions from the Donor, the Trustee shall be authorized to make such sales,

investments and reinvestments as to the Trustee may seem proper and to the advantage of the estate, without regard to the investments prescribed by the laws of the State of New York for legal trust investments.

Upon the death of the Donor all investments or reinvestments shall be left to the discretion and judgment of the Trustee, with full power and authority to retain any and all securities constituting the principal of the trust fund, and all further sales, investments or reinvestments shall be subject only to the control and discretion of the Trustee, and the Trustee shall not necessarily be limited to those securities prescribed by the laws of the State of New York for legal trust investments.

Subject to the limitations above prescribed, the Trustee shall have full power to sell and transfer any and all of said securities or any other property, real or personal, that may be taken under the terms of the trust, and to execute and deliver sufficient assignments, releases or satisfactions of bonds and mortgags, or other securities, or to sell and convey any real estate forming part of the trust estate and [fol. 39] to execute, acknowledge and deliver good and sufficient deed or deeds of conveyance therefor.

No purchaser upon any sale by the Trustee shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the validity, expediency or propriety of any such sale.

Third. In any case in which the Trustee is required, pursuant to the provisions of this indenture to divide the principal of the trust estate into parts or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind, or partly in kind and partly money, and for the purpose of such allotment the judgment of the Trustee concerning the propriety thereof, and the relative value for the purpose of division or distribution of the property and securities so allotted, shall be binding and conclusive on all persons and corporations interested therein.

Fourth. Subject to the limitations above prescribed the Trustee is authorized and empowered to vote in person or by proxy upon all stocks or other securities held by it; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at

such times and upon such terms and conditions as the Trustee shall deem proper; to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation, or to the lease by any person or [fol. 40] corporation of his or its property or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger, sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities of any corporation and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds or other investments held by the Trustee hereunder all rights, powers and privileges as are or may be lawfully exercised by any person, owning similar property in his own right, provided, however, that the Trustee shall not be required to make any of the payments herein provided, except from the principal of the trust fund, or from funds furnished for that purpose by the Donor.

In the event that the Trustee shall request from the Donor written instructions as to the action which it shall take in regard to any of the matters set forth in this paragraph, and the Donor shall neglect or refuse to furnish such instructions for a period of ten (10) days, or in the event that the Donor shall be unable for any reason to furnish such instructions, the Trustee is hereby authorized and [fol. 41] empowered to take such action in regard to such matters as it may deem proper and desirable.

The Donor hereby expressly reserves to himself the privileges of increasing the principal of the trust estate, at any time by adding thereto personal property and securities which the Trustee shall receive, hold, manage, sell, invest and reinvest in the same manner as hereinbefore specified in respect of the securities forming part of the original fund.

Fifth. The Trustee may in its sole discretion cause the securities which may from time to time comprise the trust fund, or any part thereof, to be registered in its name as Trustee hereunder, or in its own name, or in the name of its nominee, or to take and keep the same unregistered, and to retain them or any part thereof, in such condition that they will pass by delivery.

Sixth. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust, a commission of one per cent. (1%) per annum upon income, and is hereby authorized to deduct such commission before paying the income to the beneficiary hereunder.

The Trustee also shall be entitled to a commission of one per cent. (1%) upon the market value of the trust fund when and as the trust shall terminate.

The Trustee is also authorized, in the discharge of its duties, to employ counsel and agents and to determine and pay to them reasonable compensation, and it shall be [fol. 42] entitled to reimbursement for the same, and for such other expenses and charges as it may deem necessary and proper to incur.

Seventh. The Donor covenants and agrees to make, execute, and deliver in due form of law such other and further assignments, conveyances or other instruments as the Trustee may deem requisite or necessary to effectuate the purposes hereof.

Eighth. The Trustee is further authorized and empowered to pay out of the income received from the trust fund any and all taxes which properly may become payable from time to time, under the laws of the United States, or of any state, county or municipality on said trust property, or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

Ninth. In case of securities taken or purchased for said trust fund at a premium, the Trustee shall not be bound to set aside any part of the income thereof as a sinking fund to retire or absorb such premium.

Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance

of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the [fol. 43] manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the devised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof, but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned.

Eleventh. The Trustee by joining in the execution of this instrument, signifies its acceptance of the trust.

[fol. 44] Twelfth. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by a Vice-President, and its corporate seal to be hereunto affixed and

attested by an Assistant Secretary as of the day and year first above written.

Wm. H. Porter. Signed, sealed and delivered in the presence of T. F. Mallaby. Bankers Trust Company, by F. N. B. Close, Vice-President. Attest: B. Page, Assistant Secretary.

[fol. 45] STATE OF NEW YORK,
County of New York, ss:

On this 12th day of May, 1919, before me personally came William H. Porter, to me known and known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

Thos. W. Joyce, Notary Public, Kings County, N. Y. Ctf. No. 22. Certificate filed in New York County No. 28. Register's Office N. Y. County Ctf. No. 10,020.

STATE OF NEW YORK,
County of New York, ss:

On this 13th day of May, 1919, before me personally came F. N. B. Close to me known, who, being by me duly sworn, did depose and say that he resides at New York City, N. Y.; that he is a Vice-President of Bankers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

J. G. Gradley, Notary Public, Westchester County. Certificate filed in New York County No. 272. New York Register's No. 10207. My commission expires March 30th, 1920.

[fol. 46] EXHIBIT D TO PETITION

Supporting Schedule "E"

(Federal Estate Tax Return)

November 27, 1926.

Trust No. 1

Bankers Trust Company, as trustee under deed of trust made by William H. Porter on October 18, 1918, in favor of his daughter, Helen Porter Davisson, and other beneficiaries.

DEAR SIRS: Pursuant to the power reserved by me in the Tenth Article of the above described Deed of Trust, I hereby revoke said Deed and terminate the interests of all persons therein, and I hereby direct you to deliver the principal thereof, all income on such principal accrued but not actually received, and all income thereon received but not as yet distributed to the beneficiary, to yourselves as Trustee under a new Deed of Trust dated the same date as this letter and executed by me in favor of said Helen Porter Davisson and other beneficiaries, such principal to be held by you as principal of the new trust and such income, whether accrued or received, to be treated by you as you would have treated that income under the trust which I now revoke.

Very truly yours, Wm. H. Porter. (Seal.)

[fol. 47] STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1926, before me personally came William H. Porter, to me known to be the individual described in and who executed the foregoing Revocation and acknowledged to me that he executed the same.

James J. McDermott, Notary Public, Bronx Co. No. 25, Reg. No. 2707. Cert. filed in N. Y. Co. No. 253, Reg. No. 7172. Queens Co. 1919, and Westchester Co. Commission expires March 30, 1927.

EXHIBIT E TO PETITION

Supporting Schedule "E"

(Federal Estate Tax Return)

November 27, 1926.

Trust No. 2

Bankers Trust Company, as trustee under deed of trust made by William H. Porter on February 1, 1919, in favor of his daughter, Helen Porter Davisson, and other beneficiaries.

DEAR SIRS: Pursuant to the power reserved by me in the Tenth Article of the above described Deed of Trust, I [fol. 48] hereby revoke said Deed and terminate the interests of all persons therein, and I hereby direct you to deliver the principal thereof, all income on such principal accrued but not actually received, and all income thereon received by you not as yet distributed to the beneficiary, to yourselves as Trustee under a new Deed of Trust dated the same date as this letter and executed by me in favor of said Helen Porter Davisson and other beneficiaries, such principal to be held by you as principal of the new trust and such income, whether accrued or received, to be treated by you would have treated that income under the trust which I now revoke.

Very truly yours, Wm. H. Porter. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1926, before me personally came William H. Porter, to me known to be the individual described in and who executed the foregoing Revocation and acknowledged to me that he executed the same.

James J. McDermott, Notary Public, Bronx Co., No. 25, Reg. No. 2707. Cert. filed in N. Y. Co. No. 253, Reg. No. 7172. Queens Co. 1919, and Westchester Co. Commission expires March 30, 1927.

[fol. 49] EXHIBIT F TO PETITION

Bankers Trust Company, New York

(Federal Estate Tax Return)

Supporting Schedule E

Helen Porter Davisson Trust No. 3

This Indenture made the 27th day of November, 1926, between William H. Porter, of Glen Cove, Nassau County, New York, party of the first part (hereinafter called the "Donor"), and Bankers Trust Company, a corporation of the State of New York, having its principal offices in the Borough of Manhattan, City and State of New York, party of the second part, (hereinafter called the "Trustee").

Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned.

Now, Therefore, this Indenture Witnesseth, That in consideration of the premises, the mutual covenants herein contained, and of other good and valuable considerations, and of the sum of One Dollar ($1.00) to him in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the [fol. 50] Donor has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assign, set over and deliver unto said Trustee, its successors and assigns, the following described property and securities, to wit:

$100,000 Corporate Stock of the City of New York for the construction of rapid transit railroads, dated December 4, 1918, bearing interest at 4½% per annum, principal due June 1, 1965.

50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued for rapid transit construction.

50,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued to provide for supply of water.

Together with the appurtenances, and all the estate and rights of the Donor.

To Have and to Hold all and singular the above granted and described property and securities unto said Trustee, its successors and assigns, In Trust, Nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

[fol. 51] First. To receive, hold, manage, sell, invest and reinvest the same and every part thereof, in the manner hereinafter specified, and to collect, recover and receive the rents, issues, interest, income and profits thereof, and after deducting the commissions of the Trustee as hereinafter provided, and the proper and necessary expenses in connection with the administration of the trust, to pay over the balance thereof, hereinafter called "Income", unto Helen Porter Davisson, the daughter of the Donor, semi-annually, until she shall attain the age of forty years, and thereupon to convey, transfer and pay over to her, the said Helen Porter Davisson, the principal of this trust for her own use absolutely and forever.

In case of the death of said Helen Porter Davisson before she shall attain the age of forty years, then upon her death to divide the principal of the trust into as many equal shares as she shall leave children her surviving and deceased children who leave issue her surviving, to assign, transfer and pay over to each child of hers her surviving who was born after the date of this indenture the share so set apart for such child, to assign, transfer and pay over to the issue of any deceased child of hers per stirpes and not per capita the share so set apart for such issue, and to continue in trust for the benefit of each child of hers her surviving in being at the date of this indenture the share so set apart for such child until he or she attains the age of thirty years, at which time to assign, transfer and pay [fol. 52] over the principal of said trust to such children for his or her own use absolutely and forever.

During the minority of any child for whom a share is held in trust, the Trustee is directed to pay out or apply all or such part of the income of his or her share as may in the unrestricted discretion of the Trustee seem desirable for the proper education and comfortable maintenance and support of such child and to accumulate, invest and reinvest any unexpended balance and upon the arrival of such child

at the age of twenty-one years to pay such accumulation and all increases thereof to such child absolutely and forever. After the arrival of any such child at the age of twenty-one years, the Trustee is directed to pay over to him or her all of the income of his or her trust semi-annually.

In case of the death of a child of the said Helen Porter Davisson for whom a share is held in trust as aforesaid before he or she shall attain the age of thirty years (but only in the event of the death of said Helen Porter Davisson before she shall attain the age of forty years) the Trustee is directed to assign, transfer and pay over the principal of said trust to the issue of such child per stirpes and not per capita, but if there be no such issue, then in equal parts to the children of said Helen Porter Davisson then surviving and issue of deceased children, the issue of deceased children to take per stirpes and not per capita, but if there be no such children or issue of such deceased children, then to Jamie Porter, the granddaughter of the Donor, for her own use, absolutely and forever.

[fol. 53] Second. The Trustee is authorized and empowered to retain, subject to the provisions hereof, any and all of the securities hereinbefore described in their present form, and also such additional properties as the Donor may from time to time add to the trust estate.

All investments or reinvestments made by the Trustee shall be subject to the control and written directions of the Donor during his lifetime, and the Trustee shall be fully protected in making any sale, investment or reinvestment as shall be directed by the Donor in writing during his lifetime and shall not be liable in any way for depreciation or loss incurred by reason of such sale, investment or reinvestment.

In the absence of any such written directions from the Donor, the Trustee shall be authorized to make such sales, investments or reinvestments as to the Trustee may seem proper and to the advantage of the estate, without regard to the investments prescribed by the laws of the State of New York for legal trust investments.

Upon the death of the Donor all investments or reinvestments shall be left to the discretion and judgment of the

Trustee, with full power and authority to retain any and all securities constituting the principal of the trust fund, and all further sales, investments or reinvestments shall be subject only to the control and discretion of the Trustee, and the Trustee shall not necessarily be limited to those securities prescribed by the laws of the State of New York for legal trust investments.

[fol. 54] Subject to the limitations above prescribed, the Trustee shall have full power to sell and transfer any and all of said securities or any other property, real or personal, that may be taken under the terms of the trust, and to execute and deliver sufficient assignments, releases or satisfactions of bonds and mortgages, or other securities, or to sell and convey any real estate forming part of the trust estate and to execute, acknowledge and deliver good and sufficient deed or deeds of conveyance therefor.

No purchaser upon any sale by the Trustee shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the validity, expediency or propriety of any such sale.

Third. In any case in which the Trustee is required, pursuant to the provisions of this indenture to divide the principal of the trust estate into parts or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind, or partly in kind and partly money, and for the purpose of such allotment the judgment of the Trustee concerning the propriety thereof, and the relative value for the purpose of division or distribution of the property and securities so allotted, shall be binding and conclusive on all persons and corporations interested therein.

Fourth. Subject to the limitations above prescribed the Trustee is authorized and empowered to vote in person or [fol. 55] by proxy upon all stocks or other securities held by it; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at such times and upon such terms and conditions as the Trustee shall deem proper; to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion

thereof, to any person or corporation, or to the lease by any person or corporation of his or its prperty or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger, sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities of any corporation, and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds or other investments held by the Trustee hereunder all rights, powers and privileges as are or may be lawfully exercised by any person owning similar property in his own right provided, however, that the Trustee shall not be required to make any of the payments herein provided, except from the principal of the trust fund, or from funds furnished for that purpose by the Donor.

[fol. 56] In the event that the Trustee shall request from the Donor written instructions as to the action which it shall take in regard to any of the matters set forth in this paragraph, and the Donor shall neglect or refuse to furnish such instructions for a period of ten (10) days, or in the event that the Donor shall be unable for any reason to furnish such instructions, the Trustee is hereby authorized and empowered to take such action in regard to such matters as it may deem proper and desirable.

The Donor hereby expressly reserves to himself the privilege of increasing the principal of the trust estate, at any time by adding thereto personal property and securities which the Trustee shall receive, hold, manage, sell, invest and reinvest in the same manner as hereinbefore specified in respect of the securities forming part of the original fund.

Fifth. The Trustee may in its sole discretion cause the securities which may from time to time comprise the trust fund, or any part thereof, to be registered in its name as Trustee hereunder, or in its own name, or in the name of

its nominee, or to take and keep the same unregistered, and to retain them or any part thereof, in such condition that they will pass by delivery.

Sixth. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust, a commission of one per cent (1%) per annum upon income, and is hereby authorized to deduct such commission before paying the income to the beneficiary hereunder.
[fol. 57] The Trustee also shall be entitled to a com-ission of one per cent. (1%) upon the market value of the trust fund when and as the trust shall terminate.
The Trustee is also authorized, in the discharge of its duties, to employ counsel and agents and to determine and pay to them reasonable compensation, and it shall be entitled to reimbursement for the same, and for such other expenses and charges as it may deem necessary and proper to incur.

Seventh. The Donor covenants and agrees to make, execute and deliver in due form of law such other and further assignments, conveyances or other instruments as the Trustee may deem requisite or necessary to effectuate the purposes hereof.

Eighth. The Trustee is further authorized and empowered to pay out of the income received from the trust fund any and all taxes which properly may become payable from time to time, under the laws of the United States, or of any State, County or Municipality on said trust property, or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

Ninth. In case of securities taken or purchased for said trust fund at a premium, the Trustee shall not be bound to set aside any part of the income thereof as a sinking fund to retire or absorb such premium.

[fol. 58] Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the

trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned.

[fol. 59] Eleventh. The Trustee by joining in the execution of this instrument, signifies its acceptance of the trust.

Twelfth. It is mutually agreed that those presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by a Vice-President, and its corporate seal to be hereunto affixed and attested by an Assistant Secretary as of the day and year first above written.

Wm. H. Porter. (Seal.) Signed, sealed and delivered in the presence of James J. McDermott. Bankers Trust Company, by H. F. Wilson, Jr., Vice-President. Attest: J. E. Godridge.

[fol. 60] STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1926, before me personally came William H. Porter, to me known and known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

James J. McDermott, Notary Public, Bronx Co. No. 25, Reg. No. 2707. Cert. filed in N. Y. Co. No. 253, Reg. No. 7172. Queens Co. 1919 and Westchester Co. Commission expires March 30, 1927.

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1926, before me personally came H. J. Wilson, Jr., to me known, who being by me duly sworn, did depose and say that he resides at Upper Montclair, New Jersey; that he is a Vice-President of Bankers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

J. W. Keney, Notary Public.

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[fol. 61] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed April 8, 1929

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegation contained in the paragraph of the petition numbered 1.

2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits so much of the paragraph of the petition numbered 3, as alleges that the tax in controversy is a deficiency in Federal estate tax on the estate of William H. Porter, deceased, but denies that the amount in dispute is $103,768.22, as alleged in said paragraph numbered 3.

4. Denies that the determination of the deficiency tax is based upon errors as alleged in the paragraph of the petition numbered 4.

[fol. 62] 5. (a), (b), (c), (d), (e), (f), (g), (h) Admits the allegations contained in subparagraphs (a), (b), (c), (d), (e), (f), (g), and (h) of the paragraph of the petition numbered 5.

(i), (j) Denies the allegations contained in subparagraphs (i) and (j) of the paragraph of the petition numbered 5.

(k) Admits the allegations contained in subparagraph (k) of the paragraph of the petition numbered 5.

(l) Denies the allegations contained in subparagraph (l) of the paragraph of the petition numbered 5.

(m), (n), (o), (p), (q), (r) Denies the allegations contained in paragraphs (m), (n), (o), (p), (q), and (r) of the paragraph of the petition numbered 5.

(s), (t) Admits the allegations contained in subparagraphs (s) and (t) of the paragraph of the petition numbered 5.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore it is respectfully prayed that the determination of the Commissioner be approved.

C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: L. S. Pendleton, Special Attorney, Bureau of Internal Revenue.

EGS/lmh-3/26/29.

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[fol. 63] Before United States Board of Tax Appeals

[Title omitted]

Amendment to Answer—Filed at hearing Oct. 30, 1930

Comes now the respondent, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for

amendment to his answer filed in the above-entitled appeal alleges as follows.

(1) That in determining the deficiency tax shown in the sixty-day notice, dated December 22, 1928, the Commissioner excluded from the gross estate the value of a transfer in trust made October 18, 1918, in the sum of $107,500, made up of $105,625, corpus, and $1,875, accrued income; that in determining the deficiency as aforesaid the Commissioner excluded from the gross estate the value of a transfer in trust made on June 27, 1919, and not on Feb- [fol. 64] ruary 1, 1919, as stated in the sixty-day notice, in the sum of $108,625, made up of $106,375, corpus, and $2,250, accrued income; that in excluding the value of the corpus of the two trust funds, he erred.

(2) That there should be included in the gross estate of the decedent $105,625, representing the value of the transfer in trust made on October 18, 1918, and $106,375, representing the value of the transfer in trust made on June 27, 1919.

(3) That the said transfers are taxable as a part of the decedent's gross estate under the provisions of Section 302 (d) of the Revenue Act of 1926.

Wherefore it is respectfully prayed that the deficiency be increased in the proper amount.

C. M. Charest, General Counsel, Bureau of Internal Revenue, by L. S. P. Of Counsel: Lewis S. Pendleton, Special Attorney, Bureau of Internal Revenue.

EGS/lmh-10/29/30.

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[fol. 65] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

REPLY TO AMENDMENT TO ANSWER—Filed Nov. 8, 1930

The petitioners in the above entitled proceeding by their attorney, Richard L. Davisson, in reply to the amendment to the answer of the Respondent allege as follows:

(1) Admit so much of Paragraph (1) of the amendment to the answer as alleges that in determining the deficiency tax shown in the sixty day notice dated December 22, 1928,

the Commissioner excluded from the gross estate the value of a transfer in trust made October 18, 1918, in the sum of $107,500. made up of $105,625. corpus, and $1,875. accrued income; that in determining the deficiency as aforesaid the Commissioner excluded from the gross estate the value of a [fol. 66] transfer in trust made on June 27, 1919, and not on February 1, 1919 as stated in the sixty day notice, in the sum of $108,625, made up of $106,375. corpus, and $2,250. accrued income.

(2) Deny so much of Paragraph (1) of the amendment to the answer as alleges that in excluding the value of the corpus of the said two (2) Trusts the Commissioner erred.

(3) Deny the allegation contained in Paragraph (2) of the amendment to the answer.

(4) Deny the allegation contained in Paragraph (3) of the amendment to the answer.

(5) If the deficiency asserted in the original sixty day letter, which is Exhibit A attached to the petition, is sustained and if such deficiency is increased by the amount claimed in the amendment to the answer, the petitioners as Executors of the said Estate will be required to pay a further amount on account of the New York Estate Tax liability of the Estate, namely $32,733.56, in addition to that set forth in sub-paragraph (u) of the petition, as amended. The petitioners will pay to the New York State Tax Commission said additional amount of $32,733.56 before November 30, 1930 on account of said additional New York Estate Tax liability. The petitioners hereby make claim for credit against the Federal Estate Tax liability of said estate, as finally determined, for said additional New York Estate Tax in the sum of $32,733.56.

[fols. 67 & 68] Wherefore petitioners pray that this Board may redetermine the deficiency alleged in accordance with the foregoing.

Dated November 7th, 1930.

Richard L. Davisson, Counsel for Petitioners. Office and Post Office address: 7 Dey Street, New York City.

*Duly sworn to by Richard L. Davisson. Jurat omitted in printing.*

[fol. 69] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDMENT TO PETITION—Filed Nov. 8, 1930

The petitioners by their attorney, Richard L. Davisson, amend their petition filed in the above entitled appeal as follows:

(1) Amend Paragraph (4) of the petition so as to allege a new sub-paragraph namely, sub-paragraph (d) to read as follows:

"(d) The error of the respondent in not allowing a credit against the Federal Estate Tax liability of the Estate on account of the New York State Tax paid by said Estate to this date, and to be paid within three (3) years from the date of the filing of the Federal Estate Tax Return."

[fol. 70] (2) Amend Paragraph (5) of the petition so as to allege a new sub-paragraph namely, sub-paragraph (u) to read as follows:

"(u) Within three (3) years after the filing of the Federal Estate Tax Return for said Estate, the Executors actually paid to the State of New York, the sum of $833,402.42, which said sum includes the payment of $750,000. referred to in Paragraph (t) hereof, on account of the New York Estate Tax liability of the Estate in respect of property included in the gross estate for Federal Estate Tax purposes and petitioners claimed credit therefor within the said three (3) year period with the respondent herein."

Wherefore petitioners pray that this Board may redetermine the deficiency alleged in accordance with the foregoing.

Dated November 7th, 1930.

Richard L. Davisson, Counsel for Petitioners. Office and Post Office Address: 7 Dey Street, New York City.

[fol. 71] *Duly sworn to by Richard L. Davisson. Jurat omitted in printing.*

[fol. 72] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER TO AMENDMENT TO THE PETITION—Filed Nov. 17, 1930

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the amendment to the petition of the above-named taxpayer, admits and denies as follows:

(d) Denies the allegations of error contained in paragraph (d) of the amendment to the petition.

(u) Admits so much of paragraph (u) of the amendment to the petition as alleges that the petitioners claimed credit in the sum of $833,402.42 within three years of the filing of the Federal estate tax return on account of the New York [fol. 73] estate tax liability of the estate in respect of property included in the gross estate for Federal estate tax purposes, and denies all other allegations contained in said paragraph (u) of the amendment to the petition.

Denies each and every allegation contained in the amendment to the petition not hereinbefore specifically admitted or denied.

Wherefore it is respect-ully prayed that the determination of the Commissioner be approved.

(Signed) C. M. Charest, C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: Lewis S. Pendleton, Special Attorney, Bureau of Internal Revenue.

LSP/lmh-11/15/30.

[fol. 74] 23 B. T. A. —

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 42815

ESTHER JACKSON PORTER, as Executrix and RICHARD L. Davisson, as Surviving Executor of the Estate of William H. Porter, Deceased, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated June 30, 1931

FINDINGS OF FACT AND OPINION

1. Where the settlor of a trust estate reserves to himself alone a power to alter, change or modify the trust, such reservation renders the transfer incomplete until his death. The property is therefore properly included in his gross estate subject to tax under section 302 (d) of the Revenue Act of 1926. This is true even though in the trust agreements, the settlor expressly provided that if there was a revocation of the trust he could not designate himself or his estate as beneficiary.

[fol. 75] 2. Valid claims for balances due on subscriptions made by a father to a hospital and a university for memorials therein to a son killed in the World War are not, under section 303 (a) (1) of the Revenue Act of 1926, claims against the decedent father's estate "contracted bona fide and for an adequate and full consideration in money or money's worth" and are, therefore, not allowable as deductions from his gross estate.

3. New York Estate tax, amounting to $866,135.98, paid in respect to property included properly in the gross estate of the decedent, held, allowable as a credit to petitioners against the Federal estate tax, to the extent it does not exceed the 80 per cent credit provided by section 301 (b) of the Revenue Act of 1926.

Richard L. Davisson, Esq., Henry Mannix, Esq., and E. J. Corcoran, Esq., for the Petitioners.

Lewis S. Pendleton, Esq., for the Respondent.

The respondent determined a deficiency of $103,768.22 in estate tax, due from the estate of William H. Porter, who died a resident of the State of New York on November 30, 1926.

The errors assigned are: (a) the inclusion in the gross estate by respondent of the value of certain property alleged to have been transferred in trust on November 27, [fol. 76] 1926, amounting (less the $5,000 exemption) to $211,125; (b) the refusal of the respondent to allow as proper deductions as debts of the decedent certain amounts paid by the executors on account of pledges signed and obligations incurred by the decedent in favor of certain charitable and educational institutions; (c) the refusal of the respondent to allow full credit for taxes actually paid as state inheritance taxes; and (d) the refusal of the respondent to allow as a credit against the Federal estate tax the amount of the New York estate tax, paid and to be paid by said estate, within three years from the date of the filing of the Federal estate-tax return.

## Findings of Fact

The petitioners are the duly qualified and acting executors of the estate of William H. Porter, who died a resident of New York, November 30, 1926.

William H. Porter did, on or about October 18, 1918, transfer to the Bankers Trust Company, a corporation, as trustee under a trust agreement of the date, $100,000, principal amount, City of New York 4½ per cent bonds. This trust, hereinafter referred to as "Trust No. 1," in part provided for the payment of the trust income to the decedent's daughter, Helen Porter Davisson, until she should reach the age of thirty years and, upon her reaching such age, the principal was to be paid to her. In the event of her death before attaining the age of thirty years, the principal [fol. 77] was to be held in trust for the benefit of her son, Richard L. Davisson, Jr., until he reached the age of thirty years, at which time the principal was to be paid to him. Other provisions of this trust, effective on various contingencies, are unimportant in the instant case.

On or about February 1, 1919, the decedent transferred to said Bankers Trust Company, as trustee, under an agreement of that date, $100,000, principal amount, City of New

York 4½ per cent corporate stock. This trust instrument, hereinafter referred to as "Trust No. 2," provided for the payment of the trust income to decedent's daughter, Helen Porter Davisson, until she should reach the age of forty years, and upon her attaining such age, the principal was to be paid to her. In the event of her death before reaching the age of forty years, the principal was to be held in trust for the benefit of her said child, Richard L. Davisson, Jr., until he should reach the age of thirty years, at which time the principal was to be paid to him. Other provisions of this trust are not material in the instant case.

Both said trusts contained the following provision:

Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the [fol. 78] trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest, or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interest of third parties may be concerned.

The trusts were not created in contemplation of death. [fol. 79] At the time of the creation of both the trusts, the decedent's daughter, Helen Porter Davisson, had only one child, Richard L. Davisson, Jr. Between the dates of the creation of the said trusts and November 27, 1926, two more children, Joan Davisson and William Porter Davisson, were born to said Helen Porter Davisson.

In order to provide for the newly-born grandchildren, the decedent determined to exercise the power reserved to him in paragraph "Tenth" of the said two trust deeds and, with this purpose in view, he wrote two letters to the Bankers Trust Company, the latter part of October, 1926, indicating his desire and determination.

On November 27, 1926, three days prior to his death, William H. Porter executed and delivered to the Bankers Trust Company simultaneously three instruments, one of which, addressed to the Bankers Trust Company as trustee, relative to Trust No. 1, provided:

Pursuant to the power reserved by me in the Tenth Article of the above described Deed of Trust, I hereby revoke said Deed and terminate the interests of all persons therein, and I hereby direct you to deliver the principal thereof, all income on such principal accrued but not actually received, and all income thereon received but not yet distributed to the beneficiary, to yourselves as Trustee under a new Deed of Trust dated the same date as this letter and executed by me in favor of said Helen Porter [fol. 80] Davisson and other beneficiaries, such principal to be held by you as principal of the new trust and such income, whether accrued or received, to be treated by you as you would have treated that income under the trust which I now revoke.

Very truly yours, (Signed) Wm. H. Porter. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 27th day of November, 1926, before me personally came William H. Porter, to me known to be the individual described in and who executed the foregoing Revocation and acknowledged to me that he executed the same.

(Signed) James J. McDermott.

Another instrument of the same character, so executed and delivered, related to Trust No. 2. Thereupon the said

William H. Porter executed a new trust agreement conveying to the Banker's Trust Company as trustee the same securities as had theretofore been conveyed to the Banker's Trust Company as trustee in Trusts Nos. 1 and 2, already described in our findings of fact. This new trust agreement, executed November 27, 1926, contained similar minute [fol. 81] instructions to the trustee as to the management of the funds entrusted to its care, disposition of income, investing and reinvesting the principal, and other like instructions, as was contained in Trusts Nos. 1 and 2. This trust agreement provided in part that Helen Porter Davisson should receive the income therefrom until she attained the age of forty years, at which time she was to receive the principal. In the event of her death before reaching that age, the principal was to be held in trust for the benefit of her surviving children and the issue of any deceased child per stirpes and not per capita, upon terms and conditions stated in the trust indenture.

This new trust agreement contained the same paragraph ten as was contained in Trusts Nos. 1 and 2, which has already been set out in full in these findings of fact.

The respondent included in decedent's gross estate the sum of $211,125 as representing the value, on the date of decedent's death, of the securities described in Trust No. 3 of November 27, 1926. It was alleged in the petition and admitted by respondent in his answer that at the date decedent executed Trust No. 3, to wit, November 27, 1926, neither the decedent nor his physicians nor his family had any anticipation or expectation that his death would occur soon thereafter, and there was no reason to believe or anticipate that the decedent did not have many years of life ahead of him. From this we find that the decedent did not execute Trust No. 3 in contemplation of death.

[fol. 82] On or about October 18, 1918, decedent transferred to Bankers Trust Company, as trustee, under trust indenture of that date, $100,000, principal amount, City of New York 4½ per cent. bonds. Under the terms of the trust, hereinafter referred to as Jamie Porter Trust No. 1, the income was directed to be paid to the decedent's son, James J. Porter, until he reached the age of thirty years, and thereupon to pay over the principal to him. In the event of the death of James J. Porter before attaining the

age of thirty years, the trust was to continue for the benefit of his daughter, the decedent's grandchild, Jane Hetherington Porter, also known as Jamie Porter.

On or about June 27, 1919, the decedent transferred to Bankers Trust Company, as trustee, under trust indenture of such date, $100,000, principal amount, City of New York 4½ per cent. corporate stock. Under the terms of the trust, hereinafter referred to as Jamie Porter Trust No. 2, the income was to be accumulated during the minority of the decedent's grandchild, Jane Hetherington Porter (Jamie Porter), and thereafter paid to her until she attained the age of thirty-five years, at which time the principal was to be paid to her. In the event of her death before she attained the age of thirty-five years, the trustee was directed to transfer and pay over the principal of the fund in equal shares to the children of said Jane Hetherington Porter and in default of children surviving, then to Helen Porter Davisson, daughter of the donor, and in case of her prior death, in equal shares to the children of said Helen [fol. 83] Porter Davisson then living.

The same provisions by which the decedent reserved the right and power to modify or alter the Helen Porter Davisson Trusts Nos. 1, 2 and 3 are contained in the Jamie Porter Trusts Nos. 1 and 2.

At the date of the decedent's death, November 30, 1926, the value of the securities held under Helen Porter Davisson Trust No. 3 was $211,125 and the value of the securities held under Jamie Porter Trust No. 1 was $105,625, and under the Jamie Porter Trust No. 2 was $106,375.

On May 12, 1927, payment was made by the executors of decedent to the treasurer of the New North Country Community Hospital of Glen Cove, Long Island, of the sum of $6,000, being the balance of a written subscription or pledge of $12,000 made by decedent during his lifetime to said hospital. This subscription was made by decedent for the specific purpose of equipping an X-ray room in the hospital as a memorial to his son, who lost his life in the World War. During the decedent's lifetime, the construction of the hospital was undertaken and an X-ray room was provided therein in reliance on said promise of decedent.

On May 12, 1927, the executors of decedent's estate paid to Princeton University, Princeton, N. J., the sum of $5,000

as the balance of a subscription of $25,000 made by the decedent during his lifetime for the purpose of erecting in the University Chapel a bay, containing a memorial window in memory of decedent's son who lost his life in the [fol. 84] World War. Princeton University, relying on decedent's said subscription, had prior to decedent's death contracted for and commenced construction of such bay and window.

The respondent disallowed the deductions claimed by petitioners on account of said subscriptions and payments.

The petitioners, at the hearing, withdrew their claim for deductions on account of other subscriptions or pledges, aggregating $2,205, made to Boy Scouts of Nassau County, Hampton Tuskegee Endowment Fund, Nassau Hospital Association, and Civic Forum of New York City, claimed in their petition.

Respondent's deficiency notice shows he allowed as a credit for State inheritance taxes, paid by petitioners, the sum of $226,815.16. Said notice should have stated the amount to be $226,855.16.

Within three years of the filing of petitioners' return they paid and claimed credit for $866,135.98, paid on account of New York estate tax on decedent's estate. On May 26, 1927, $300,000 was paid; on May 25, 1928, $450,000; on October 25, 1930, $83,402.42; and on November 12, 1930, $32,733.56. The total, $866,135.98, respondent has not allowed. Of such total $833,402.42 was paid with respect to property included by the respondent as part of decedent's gross estate and $32,733.56 with respect to the value of the property included in the Jamie Porter Trusts Nos. 1 and 2, which the respondent alleged in his amended answer should be included as a part of decedent's gross estate, which assertion petitioners deny.

[fol. 85] OPINION

BLACK:

The petitioners contend that the trust herein referred to as Trust No. 3, dated November 27, 1926, did not create any new trust nor revoke trusts designated herein as Trusts Nos. 1 and 2, and that, if it had any legal effect, it was merely to modify Trusts Nos. 1 and 2.

They further contend that if a new trust was created on November 27, 1926, by Trust No. 3, section 302 (c) is unconstitutional in so far as it provides that transfers made within two years prior to death shall be deemed to have been made in contemplation of death.

They insist that the pledges made by the decedent to the New North Country Community Hospital and Princeton University are proper deductions as claims against the estate under section 303 (a) (1) of the Revenue Act of 1926, or under section 303 (a) (3) of said act, as transfers to or for the use of corporations organized and operated exclusively for charitable and educational purposes, and they claim full credit for the amount paid on account of New York estate tax.

The respondent disputes all the above contentions made by petitioners and insists that the property held by the Bankers Trust Company as trustee under Trust No. 3 was transferred by the decedent to said company after the enactment of the Revenue Act of 1926, without consideration, and within two years of the decedent's death. The respondent further insists that Trust No. 3 falls within [fol. 86] the provisions of said section 302 (c) and that the transfer of the property held in trust must be deemed and held to have been made in contemplation of death within the meaning of the Act.

In view of the fact that all the trust agreements including the one executed November 27, 1926, referred to as Trust No. 3, contained paragraph "Tenth," which has been set out in full in our findings of fact, and in view of the further fact that we think said paragraph "Tenth" in these trust agreements brings them within the provisions of section 302 (d) of the Revenue Act of 1926, we do not find it necessary to decide whether or not respondent correctly included the property described in Trust No. 3 as a part of decedent's estate under section 302 (c), nor do we find it necessary to pass upon petitioners' assignment of error that section 302(c) is unconstitutional.

The respondent also insists that if the legal effect of Trust No. 3 was merely to modify or amend Trusts Nos. 1 and 2 and did not operate to effect a transfer of any property rights over which the decedent had the power of disposition, the entire value of the property held under Trusts Nos. 1 and 2, as amended by Trust No. 3, constituted

a part of decedent's gross estate under the provisions of section 302 (d).

The respondent further contends that the entire value of the property held under the Jamie Porter Trusts Nos. 1 and 2 should be included as a part of the decedent's gross estate under Section 302 (d) of the Revenue Act of 1926. Section 302 (d) and (h) of the Revenue Act of 1926, read:

[fol. 87] (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f) and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

By reading paragraph "Tenth" which was a part of each of the trust instruments involved in the instant case, it will be seen that the settlor reserved the right to himself to modify or alter the indentures. The only restrictions placed on this power was that the donor could not make himself or his estate the beneficiary. Outside of this limitation his power to alter or modify was unlimited. He went so far as to say in said paragraph:

"Tenth". "*No one, born or unborn, shall have any right,* [fol. 88] *interest, or estate under this indenture except subject to the proper modification or alteration thereof.*"

And this power to alter or modify existed right up to the day of his death. It was again reserved by him in the trust agreement No. 3, which he executed three days before

his death, November 27, 1926. It was a power outstanding when he died and only death extinguished it. Up until the very day of his death he might have completely changed the beneficiaries of the trusts. Their estates were only made secure when the hand of death extinguished the power.

May v. Heiner, 281 U. S. 238, and the group of cases following it, cited by counsel for petitioner in their brief, it seems to us, have no application. Said cases concern a situation where the grantor of property in a deed or the settlor of a trust has made an irrevocable conveyance of the property or revocable only by and with the consent of adverse interests, subject only to a reservation to himself of a life estate. What the Supreme Court held in May v. Heiner, supra, and the group of cases following it, was that where there has been an irrevocable conveyance of the property with a reservation of the life estate to the grantor, nothing passes by his death when the life estate is extinguished. The title had already passed by the prior conveyance. It was to cure the effect of the decision of May v. Heiner, supra, that Congress on May 3, 1931, adopted a Joint Resolution amending Section 302 (c) of the Act of 1926, but this Section 302 (c), as amended by the Joint Resolution of May 3, 1931, has nothing whatever [fol. 89] to do with Section 302 (d), as we view it. In the instant case the donor had not made an irrevocable conveyance of the property to the trustee reserving a life estate to himself, but, on the contrary, had expressly reserved to himself the right to alter and amend and modify the trust agreements.

We think that even without Section 302 (d) of the 1926 Act, under the principles of Reinecke v. Northern Trust Company, 278 U. S. 339, and Chase National Bank v. United States, 278 U. S. 327, the property conveyed by the trusts in the instant case should be included as a part of decedent's estate. But, if there should be any doubt about that, it seems to us it has been removed by Congress in the enactment of Section 302 (d) of the Revenue Act of 1926. Reinecke v. Northern Trust Company, supra, and Chase National Bank v. United States, supra, construed Acts prior to the Revenue Act of 1926, and which acts did not contain any Section 302 (d) (h). It seems to us that the aim of Congress, in inserting the provisions of subparagraph (d) of Section 302, was to prevent an avoidance

in whole or in part of the estate tax by a method of disposition which would enable the owner of property so long as he lived to control the future benefits and disposition of property as effectually as by will, and the provision under review is an adjunct of the general scheme of taxation of which it is a part entirely appropriate as a means to that end.

It therefore seems clear that under the plain language of Section 302 (d) of the Revenue Act of 1926, all the prop- [fol. 90] erty conveyed by the trust instruments involved in the instant case must be included as a part of decedent's estate unless that clause in paragraph "Tenth" of the trust instruments, wherein the donor provided that in any alteration or modification of the trust instruments, he could not designate himself or his estate as the beneficiary, takes it out of the purview of the Statute. We have, however, already decided that question adversely to petitioner in Loring A. Cover, et al., 17 B. T. A. 1177 and Bank of New York & Trust Company, 20 B. T. A. 677. And if not in those two cases, certainly we have decided it adversely to petitioner in Estate of George R. Cook, 23 B. T. A. 335.

Counsel for petitioner cite in support of their contention Brady v. Ham, 45 Fed. (2d) 454. It must be admitted that that decision does support petitioner's position, but, as we endeavor to point out in Estate of George R. Cook, supra; Brady v. Ham, supra, is contrary to what we conceive to be the plain language of the statute and the decisions of the Supreme Court in Reinecke v. Northern Trust Co., supra, and Chase National Bank v. United States, supra. It seems to us that the discussion in Brady v. Ham, supra, about the failure of the donor of the trust to reserve the right to confer upon himself or his estate the economic benefits of the property, is irrelevant. The estate tax levied by the Federal Government is a transfer tax.

In a case where the settlor of a trust has reserved the right to alter, modify or revoke the trust, substantial rights [fol. 91] pass by reason of his death. Up to the very moment of his death, he has the right to exercise that power and the beneficiary of the trust may be ousted by the exercise of it. When the settlor dies that power is gone and that which up to that time was an insecure estate ripens into one which is completely vested. It is this transfer

completed by death which the statute taxes and we think that the mere fact that the settlor has no power to make himself or his own estate the beneficiary has nothing to do with it.

On authority of Reinecke v. Northern Trust Company, supra; Chase National Bank v. United States, supra; Loring A. Cover, et al., supra; Bank of New York and Trust Company, supra; and Estate of George R. Cook, supra; we hold that the value of the property at the time of decedent's death, included in said trusts, should be included as a part of decedent's gross estate.

The claims for balances due from the decedent on subscriptions to the New North Country Hospital and to Princeton University for memorials therein, as set forth in our Findings of Fact, were valid and enforceable against decedent's executors. See in re Taylor's Estate, 251 N. Y. 257, 167 N. E. 434; Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173; Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325, 25 R. C. L. 1408.

In the case of Jeptha H. Wade, Jr., et al., Executors, 21 B. T. A. 339, relied on by petitioners, we held that the consideration for the pledges was the payment by others of large amounts of money to the same institutions and that the consideration for each pledge was adequate and [fol. 92] full and in money or money's worth, within the meaning of Section 303 (a) (1) of the Revenue Act of 1926.

In the instant case we have no such situation before us. In the absence of proof of the adequate and full value in money or money's worth of the memorials erected or contracted for, the claims for balance of decedent's subscriptions paid by the executors may not be allowed as a deduction from decedent's gross estate. Georgianna M. Romberger, et al., Executors, 21 B. T. A. 193.

Petitioners further contend that, "If for any reason it should be determined that these pledges were not deductible as 'claims against the estate' under Section 303 (a) (1), they were proper deductions as 'transfers to charitable and educational corporations' under Section 303 (a) (3)."

Section 303 (a) (3) reads:

The amount of all bequests, legacies, devices, or transfers, to or for the use of the United States, any State, Ter-

ritory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or [fol. 93] trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. The amount of the deduction under this paragraph for any transfer shall not exceed the value of the transferred property required to be included in the gross estate; * * *

In order for a transfer which has been made to a charitable or educational corporation to be deductible from the gross estate it must be proved that such institutions are operated exclusively for charitable or educational purposes and that no part of their net earnings inure to the benefit of any private stockholder or individual.

So, even though the amounts claimed by petitioners as a deduction under Section 303(a) (3) come within the general provisions of that sub-paragraph (a matter which we do not now decide), we could not allow these amounts because we have no proof before us showing that the New North Country Community Hospital is operated exclusively for charitable purposes nor that Princeton University is operated exclusively for educational purposes and we have no proof showing that no part of the net earnings of these institutions inure to the benefit of any private stockholder or individual. This being the state of the evidence, peti- [fol. 94] tioners' contention that these amounts be deducted from decedent's gross estate under the provisions of Section 303 (a) (3) is denied. Edward C. Moore, Jr., et al., Executors, 21 B. T. A. 279; Bronnan v. Cabanno M. E. Church, 192 S. W. 982; Frohlinger v. Richardson, 218 Pac. 497.

The evidence shows that the petitioners have paid New York estate tax in the amount of $866,135.98 in addition to all other State estate and inheritance taxes which have been allowed as credits by the respondent, and that claims for the credit of such New York estate-tax payments were filed with the respondent within three years after the filing of the Federal estate tax-return. The sum of $833,402.42 of the above amount was paid with respect to property included by the respondent as a part of the decedent's gross estate and $32,733.56 with respect to property which was not so included but which respondent in his amended answer alleged should be so included.

The petitioners having paid the sum of $866,135.98 on account of the New York estate tax, in respect to property which we hold should be included in the gross estate of the decedent, are entitled, and we so adjudge, to full credit of same against the Federal estate tax determined in accordance with this opinion, to the extent it does not exceed the 80 per cent. credit provided by Section 301 (b) of the Act.

Reviewed by the Board.

Decision will be entered under Rule 50.

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[fol. 95] DISSENTING OPINION

SEAWALL, dissenting:

I feel constrained to dissent from so much of the opinion of the Board as holds that the property embraced in the trusts mentioned should be included in the gross estate of the decedent.

The law here being applied provides for an estate tax on transfers of the net property of a decedent at the time of his death. (Section 301 of the Revenue Act of 1926.) The tax is not a succession tax, payable by the beneficiary, but a transfer tax payable at the hands of the personal representative of the deceased. (Sections 305 [a] and 314 [b].) The deceased did not own the property here sought to be included in his gross estate at the time of his death. He had conveyed it away by trust deeds without power to revest it in himself or in his estate.

In neither Trust No. 1, Trust No. 2, nor Trust No. 3 did the decedent reserve the power to revoke the trusts. The

reservations were merely of the power to modify or alter; not to revoke. The power so reserved was limited to modifications or alterations not in favor of himself or his estate, but were to apply only so far as the interests of third parties were concerned.

The decedent, in the instruments of November 27, 1926, reciting revocation of the trusts, did not purport to act by virtue of any other right or power except that contained in paragraph "Tenth" set forth in the findings of fact. A new trust was not created; the funds did not change hands; other grandchildren, subsequently born, were merely provided for.

[fol. 96] Under the New York rule, which is here applicable, the donor of a trust alone cannot revoke the trust unless the power of revocation is expressly reserved. Cazzani v. Title Guarantee & Trust Co., 175 App. Div. 369, affd. 220 N. Y. 683, 116 N. E. 1040; Title Guarantee & Trust Company v. Hoven, 214 N. Y. 468, 108 N. E. 819; In re Carnegie's Estate, 203 App. Div. 91, 196 N. Y. Supp. 502, affd. 236 N. Y. 517, 142 N. E. 266.

Where no power of revocation is reserved, attempts by the donor to revoke are void. Garner v. Germania Life Insurance Co., 110 N. Y. 266, 18 N. E. 130; Roberts v. Taylor, et al., 300 Fed. 257; McPherson v. Rollins, 107 N. Y. 316, 14 N. E. 411; Dickey v. Goldsmith, 60 Misc. 258, 111 N. Y. Supp. 1025.

The trusts could not be revoked by the donor, one of the beneficiaries being a minor. Whittemore v. Equitable Trust Co., 250 N. Y. 298, 165 N. E. 454.

At the time of the execution of the trusts in question, all economic benefits in the trust funds passed from the decedent, without any right or power reserved to revoke such trusts or to repossess any part or interest in the funds.

In cases decided by the United States Supreme Court and relied on by the respondent, where property has been included in the gross estate for Federal estate-tax purposes, the decedent had a legal right, direct or contingent, under which he, to the moment of his death, might acquire some economic benefits in the property concerned. In Tyler v. United States, 281 U. S. 497, the decedent shared with his [fol. 97] wife the ownership and enjoyment of the property during his life and if the decedent had survived his spouse, he would have acquired the whole property. At his death

there was a shifting of economic benefits from him to his wife.

In the case of Chase National Bank, et al. v. United States, 278 U. S. 327, the decedent, by virtue of the power to change beneficiaries, could make the insurance policies payable to his estate for estate purposes, securing the cash surrender value of the policies, or borrow against the policies.

In Reinecke v. Northern Trust Co., 278 U. S. 339, the donor could revest in himself the principal of the trust.

The Supreme Court has refused to include in decedent's gross estate property no interest in which passed from the decedent at death. May, et al. v. Heiner, 281 U. S. 238; Reinecke v. Northern Trust Co., supra; and Nichols v. Coolidge, 274 U. S. 531.

Upon the hearing and in respondent's brief, only slight contention was or is made that the trust funds should be included in the gross estate, by reason of section 302 (c) of the statute. Petitioner directly challenged the constitutionality of this section under the decision of the Supreme Court in Schlesinger v. Wisconsin, 270 U. S. 230. The evidence shows clearly that the instruments of November 27, 1926, were not made in contemplation of death. Respondent placed his principal reliance on section 302 (d) which provides that there shall be included in the gross estate of [fol. 98] every decedent at the time of his death all property:

"To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, *where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke* * * *"

In the trust deeds involved here, power to amend and alter was reserved to the donor—the decedent—but this was not a general power, but a limited power as set out in the facts recited in the main opinion. Under the express limitation of the power, the decedent could not exercise it by deed or will, or otherw[illegible] in favor of himself or his estate. The possessor of a general power of appointment has authority to dispose of the property at his death by will and his position is not unlike that of an owner, for he can

make himself during life and his estate thereafter the beneficiary of the trust. An unlimited power to amend, alter or revoke a deed of trust is equivalent to a general power of disposition and a general power of disposition is the practical equivalent of a fee. Bullen v. Wisconsin, 240 U. S. 625; Lesser v. Burnet, 46 Fed. (2d) 756; Sugden, Powers, 8th Fed., 396.

The failure to exercise this general power of appointment, in effect, results in a transfer from the donee's own estate (to which he has the power to give it) and a transfer to the estate of others who take because of his death and the failure to exercise the power during life in his own favor or in the favor of others. Property passing under [fol. 99] such general power of appointment may be subject in the hands of the donee of the power to the claims of his creditors (United States v. Fields, 255 U. S. 257); or to the claims of trustees in bankruptcy (Cohen v. Samuels, 245 U. S. 50); and may be included in the estate of the decedent for estate-tax purposes (Chase National Bank, et al. v. United States, supra). But under a special, naked or limited power of appointment, such as is here under consideration, the decedent could not have sold or assigned the power (Jones v. Clifton, 101 U. S. 225). A failure to exercise such limited power can not result in any transfer of anything from the decedent, for there is no beneficial interest or estate in him to be transferred; his creditors have no claim upon his power of appointment nor can they levy execution or distraint against him while he lives, on such account, nor against his estate when he is dead; if he should become a bankrupt, no trustee in bankruptcy would have any claim against the trust funds; his interest in the trust fund being only such limited power of appointment, his estate possesses nothing of value in it to be included in the gross estate. Certainly, "to the extent of his interest therein" would not include the whole value of the property. Reinecke v. Northern Trust Co., supra; Nichols v. Coolidge, supra; May, et al. v. Heiner, supra. The Circuit Court of Appeals for the First Circuit, in the case of Brady v. Ham, 45 Fed. (2d) 454, had under consideration a trust identical with the trusts here involved, except the [fol. 100] power to change and alter the trust and to name any other beneficiaries was limited in that case to beneficiaries other than the maker of the trust; whereas in the

case before us the limitation of the power applies not only to the maker of the trusts, but his estate also. In the Brady v. Ham case, the court, by unanimous opinion, said that the decedent had expressly deprived herself of all economic benefits in the trust estate; that those benefits passed at the time of the execution of the declaration of trust, and such estate was not includable in the gross estate of the decedent, and that "To hold that such property was subject to a transfer tax would amount to what the Supreme Court had termed * * * an arbitrary and capricious exercise of legislature power".

Moreover, it is suggested that the part of section 302 (d) added by the Revenue Acts of 1924 and 1926, and which is underscored in the above quotation, is ambiguous and susceptible of different interpretations and meanings. Do the words "any change" mean (1) a change however slight, or (2) a change without limitation? Webster defines the word "any" to mean "Unlimited, and indefinite number, quantity or degree", as well as "some". Does the statute mean power to make some slight change, or unlimited power to make any change? One of the trusts herein provides that when Mrs. Davisson reaches the age of 30 years, the principal fund shall be paid to her. By way of illustration, if the sole power reserved had been to change the 30 years to 40 years, would that sole reserved power subject the trust funds to be included in the gross estate of the deced [fol. 101] ent at the time of his death? If the power to postpone to the beneficiary the enjoyment of the principal fund for ten years is power sufficient to make such change in the trust as will require the fund to be included in the decedent's gross estate, would not the power to postpone such enjoyment five years or one year or one month have the same effect? If "any change" means any slight change, even a power to cause a day's postponement, under the construction contended for, would seem to comply with the provisions of the statute. Such construction, it appears to me, would contain some of the elements of capriciousness condemned in several adjudicated cases. I prefer to think, as was held by the Circuit Court of Appeals for the First Circuit (White v. Erskine, et al., 47 Fed. (2d) 1914), that congress did not intend by section 302 (d), to create a new form of excise tax, that is, a tax on the power in the grantor to alter or amend a trust executed by him when the power

so reserved is limited as in this case. Cf. Frew v. Bowers, 12 Fed. (2d) 625. To hold under the statute that W. H. Porter's estate should be taxed on the value of the property theretofore conveyed in trust, irrevocably, by him, and not owned by him, in whole or in part, and of which no beneficial interest remained in him, at the time of his death, is to raise a serious doubt as to the constitutionality of the Act of Congress. To hold that by the power to make "any change" in the trust, Congress in the statute meant an unlimited power, to make "any change", or a power to make [fol. 102] a change, such as would leave with the settlor power to revest the property in himself, is to adopt a more reasonable construction and to avoid the doubt as to the constitutionality of the Act. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score". Panama R. R. Co. v. Johnson, 264 U. S. 375.

Smith agrees with this dissent.

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DISSENTING OPINION

MATTHEWS, dissenting:

I dissent from the majority opinion in so far as it relates to the trusts. All the trusts in question (except the so-called Trust No. 3) were executed while the Revenue Act of 1918 was in force and none of the trusts was made in contemplation of death. The 1918 Act had no counterpart of subdivisions (d) and (h) of section 302 of the Revenue Act of 1926. The shifting in the economic interest in the trust property was complete as soon as the trusts were made. The donor parted with the legal title and all beneficial interest. He reserved no power to revoke the trusts, by which he could recall the trust property. The power reserved was to alter or amend in any manner in so far as the interests of third parties were concerned, but not in such manner as to be in his own favor or in favor of his estate. The alteration or amendment of Trusts Nos. 1 and 2 by the instrument designated Trust No. 3 did not have the effect of revesting the property in the donor and the re-[fol. 103] transfer of such property to the trustees. It was not, therefore, equivalent to the creation of a new trust.

It seems to me that these trusts are in all material respects similar to the five trusts which in Reinecke v. Northern Trust Co. were held not to be subject to the tax imposed by reason of the provisions of sections 401 and 402 (c) of the Revenue Act of 1921. Section 402 (c) of the Revenue Act of 1921 is identical to the same section of the Revenue Act of 1918. The trusts were not made in contemplation of death; the donor had divested himself of all economic interest in the trust property at the time he created the trusts; the power to alter or amend was not broad enough to revest in him or his estate any interest in the property, and there was no provision in the estate-tax act then in force taxing transfers in trust not made in contemplation of death, where the power to alter or amend is reserved. As Mr. Justice Stone said in Reinecke v. Northern Trust Co., 278 U. S. 339:

* * * The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax.

[fol. 104] See also May v. Heiner, 281 U. S. 238. As the transfers were nontaxable when made, they can not be subjected to tax by a later estate-tax act. They are in the same class as trusts made in contemplation of death before the 1916 estate-tax act was passed, by persons who died subsequent thereto, and with gifts made in 1924 before the gift tax act was enacted. The Supreme Court has held that such trusts and gifts cannot be subjected to the tax. See Schwab v. Doyle, 258 U. S. 529; Nichols v. Coolidge, 274 U. S. 531; Blodgett v. Holden, 275 U. S. 142, 276 U. S. 594, and Untermeyer v. Anderson, 276 U. S. 440. I think the transfers by the trusts here in question are not subject to the tax imposed by sections 301 and 302 (d) and (h) of the Revenue Act of 1926.

A True Copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 105] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 42815

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Estate of William H. Porter, Deceased, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER OF FINAL DETERMINATION

On July 25, 1931, the respondent filed in this proceeding his computation of the deficiency in estate tax due from the above entitled petitioners, under the Opinion and Findings of Fact promulgated by the Board in this proceeding on June 30, 1931. Such computation was set for hearing under Rule 50 on July 29, 1931. The proceeding having been called for hearing at that time and the petitioner not having contested the computation filed by the respondent; the Board having examined said computation and finding it in accord with the aforesaid Opinion and Findings of Fact promulgated on June 30, 1931, it is

[fol. 106] Ordered and decided, that there is a deficiency in estate tax due by the petitioners in this proceeding in the amount of $10,676.35.

Enter.

(Signed) Charles P. Smith, Member United States Board of Tax Appeals.

Entered Jul. 30, 1931.

A True Copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

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[fol. 107] NOTICE OF FILING PETITION FOR REVIEW—Filed Jan. 22, 1932

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

To David Burnet, Esq., Commissioner of Internal Revenue:

You are hereby notified that the above named petitioners did, on the 22nd day of January, 1932, file with the Clerk

of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision [fol. 108] of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22nd day of January, 1932.

Edward N. Perkins, Counsel for Petitioner on Review. Mailing address: 15 Broad Street, New York, N. Y.

Service of a copy of the foregoing is hereby acknowledged this 22nd day of January, 1932.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

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[fol. 109] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION FOR REVIEW—Filed Jan. 22, 1932

Petition of Taxpayer for Review by the United States Circuit Court of Appeals for the Second Circuit of a Decision by the United States Board of Tax Appeals—Filed ——— —, ———

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Taxpayers, the petitioners, in this cause, by their counsel, hereby file their petition for a review by the United States Circuit Court of Appeals for the Second Circuit of [fol. 110] the decision by the United States Board of Tax Appeals rendered on July 30, 1931 (23 B. T. A. 1016), determining a deficiency in Federal Estate tax due by the Petitioners in this proceeding in the amount of $10,676.35, and respectfully show:

I

The Petitioner on Review, Esther Jackson Porter, is an inhabitant of Nassau County, State of New York, and of

the Judicial Circuit of the United States Circuit Court of Appeals for the Second Circuit. The Petitioner on Review, Richard L. Davisson is an inhabitant of the Borough of Manhattan, City and State of New York, and of the said Judicial Circuit. Petitioners on Review are the duly qualified and acting Executors of the Last Will and Testament of William H. Porter, deceased, who died a resident of the State of New York on November 30, 1926. Respondent on Review is the duly authorized and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The return was made and tax paid in the Second District of New York in the Second Circuit.

## II

### Nature of the Controversy

The controversy involves the proper determination of the petitioners' liability for Federal Estate Tax.
[fol. 111] The material facts, so far as this Petition for Review is concerned, are as follows:

### The Trusts

On October 18, 1918, the decedent transferred certain securities of the principal amount of $100,000 to the Bankers Trust Company as Trustee under a written agreement (referred to in the petition and in the opinion of the Board as "Trust No. 1") which provided that the Bankers Trust Company was to collect the income from said securities and to pay over the same to Helen Porter Davisson, a daughter of the decedent, until she should attain the age of thirty (30) years at which time the Trust was to terminate and the principal was to be paid over to said Helen Porter Davisson with remainders over. Said agreement reserved to the grantor the power to modify or alter the same as follows:

"Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate, (so as

to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and in- [fol. 112] terest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned."

On February 1, 1919, the decedent transferred certain securities of the principal amount of $100,000 to Bankers Trust Company as Trustee under a written agreement (referred to in the petition and in the Opinion of the Board as "Trust No. 2") which provided that the Trustee was to collect the income therefrom and pay the same to Helen Porter Davisson until she attain the age of forty years [fol. 113] at which time the Trust was to terminate and the principal was to be paid over to said Helen Porter Davisson with remainders over. Article Tenth of this agreement was exactly similar to Article Tenth above quoted.

At the time of the creation of Trust No. 1 and Trust No. 2, Helen Porter Davisson, the principal beneficiary of both of said trusts, had only one child, namely, Richard L. Davisson, Jr., and both of said trusts provided that, in the event of the death of Helen Porter Davisson prior to the termination of the Trusts, Richard L. Davisson, Jr., should be the beneficiary of them. Subsequently to the creation

of Trust No. 1 and Trust No. 2, two more children were born to Helen Porter Davisson, namely, Joan Davisson and William Porter Davisson. The petitioners, in their petition to the Board of Tax Appeals, alleged, and the Board of Tax Appeals determined in its findings of fact that the decedent determined to exercise the power to modify or alter reserved to him under Paragraph Tenth of Trust No. 1 and Trust No. 2 in order to provide, that in case of the death of Helen Porter Davisson before the termination of said Trust- No. 1 and No. 2 all of her children should share equally in the Trusts, and with this purpose, on November 27, 1926, decedent executed three instruments. One of these instruments is referred to in the Opinion of the Board as "Trust No. 3" and purports to create a Trust with the Bankers Trust Company, as Trustee, the principal of which was composed of the identical property which had been transferred to said Bankers [fol. 114] Trust Company under Trust No. 1 and Trust No. 2 more than seven years before and this property had been held continuously by Bankers Trust Company, as Trustee, under Trust No. 1 and Trust No. 2 until the date of the so-called Trust No. 3.

The beneficiary of Trust No. 3 was Helen Porter Davisson (being the same beneficiary named in Trust No. 1 and Trust No. 2) until she attain the age of forty (40) years at which time the trust was to terminate. One of these instruments purported to revoke Trust No. 1 and directed Bankers Trust Company to transfer the corpus thereof to Trust No. 3. Another instrument purported to revoke Trust No. 2 and directed Bankers Trust Company to transfer the corpus thereof to Trust No. 3.

The so-called Trust No. 3 provided that, in the event of the death of Helen Porter Davisson, prior to the termination thereof, the principal was to be held in trust for the benefit of all her surviving children, and the issue of any deceased child, per stirpes and not per capita, upon the terms and conditions set forth in said instrument, instead of for the benefit of Richard L. Davisson, Jr., alone as provided in Trusts No. 1 and No. 2.

With respect to Trust No. 3, the Respondent determined that "the trust created November 27, 1926, is under Section 302-C of the Revenue Act of 1926 part of decedent's estate for estate tax purposes and no adjustment is war-

ranted in the tentative determination except the allowance of an exemption of $5,000 in the value determined for the [fol. 115] trust property. The value of this trust is therefore $211,125." Section 302-C refers to transfers in contemplation of death.

The petition of the taxpayer to the Board of Tax Appeals contended that the instrument dated November 27, 1926, Trust No. 3, did not constitute a new trust but was merely a modification of Trust No. 1 and Trust No. 2. The Board in its opinion did not decide this issue.

The petition of the taxpayer to the Board of Tax Appeals to review the determination of the Respondent alleges that neither Trust No. 3 nor Trust No. 1 nor Trust No. 2 were made in contemplation of death and the answer filed by General Counsel for Respondent with the Board expressly admits these allegations. In its Findings of Fact, the Board determined that neither Trust No. 1, nor Trust No. 2, nor Trust No. 3 were in fact created in contemplation of death, but the Board, in its opinion, did not decide whether or not the Respondent correctly included the property described in Trust No. 3 as part of the gross estate of the decedent under Section 302-C.

On October 18, 1918, the decedent transferred to the Bankers Trust Company as Trustee bonds in the principal amount of $100,000 under a written agreement referred to in the opinion of the Board as Jamie Porter Trust No. 1, which provided that the income therefrom shall be paid to James J. Porter, the son of the decedent until he attained the age of thirty (30) years. In the event of the death of said James J. Porter before attaining the age of thirty [fol. 116] (30) years, the Trustee was directed to pay the income therefrom to Jane Hetherington Porter, also called "Jamie Porter" until she attained the age of thirty years, at which time the Trust was to terminate. James J. Porter died before attaining the age of thirty (30) years. This agreement contained an article exactly similar to Article Tenth above quoted.

On June 27, 1919, decedent transferred to Bankers Trust Company as Trustee bonds in the principal amount of $100,000 under a written agreement, referred to in the Opinion of the Board as Jamie Porter Trust No. 2, which provided that the income therefrom be accumulated for the benefit of Jane Hetherington Porter during her minority

after which time, the Trustee was directed to pay the income to said Jane Hetherington Porter until she attained the age of thirty-five (35) years at which time the Trust was to terminate. Said agreement contained an article exactly similar to Article Tenth above quoted.

The General Counsel alleged in his Amendment to the Answer that the corpus held under Jamie Porter Trust No. 1, having a value of $105,625, and Jamie Porter Trust No. 2, having a value of $106,375, should be included in the decedent's gross estate for Federal Estate Tax purposes under the provisions of Section 302(d) of the Revenue Act of 1926. This section refers to transfers where decedent reserves a power to alter, amend or revoke.

The petition of the taxpayer and the Reply of the taxpayer to the Amendment to the Answer filed with the Board alleges that none of the property transferred under [fol. 117] any of the above trusts should be included in the gross estate of the decedent for Federal Estate Tax purposes, under Section 302(*d*) of the Revenue Act of 1926, by reason of the power reserved to the decedent to modify or alter, as set forth in Article Tenth above quoted.

The Board included the corpus of all the above mentioned trusts in the gross estate of the decedent for Federal Estate tax, under Section 302 (d) of the Revenue Act of 1926, because of the power to modify or alter, reserved to the grantor in Article Tenth of each of said instruments.

## Deductions Claimed

The Board held that a payment by the Executors to the New North Country Community Hospital of Glen Cove, Long Island, New York, of the sum of $6,000. being the balance of a written subscription or pledge of $12,000. made by the decedent during his lifetime to said hospital, and a payment by the Executors to Princeton University, Princeton, New Jersey, of the sum of $5,000., being the balance of a subscription of $25,000, made by the decedent during his lifetime for the purpose of erecting in the University Chapel a bay containing a memorial window in memory of decedent's son who lost his life in the World War, were not deductible from the gross estate of the decedent for the purposes of Federal Estate Tax. The petitioners allege that such payments are proper deductions.

[fol. 118] III

The said taxpayer being aggrieved by the Findings of Fact and Conclusion of Law contained in said Findings and Opinion, Decision and Order of the Board of Tax Appeals, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Second Circuit, in accordance with the provisions of the Revenue Act of 1926.

IV

Assignments of Error

The errors committed by the Board of Tax Appeals upon which the Petitioners rely as a basis of this proceeding are as follows:

1. The Board of Tax Appeals erred in failing to decide whether or not the respondent correctly included the property described in Trust No. 3 as part of the decedent's gross estate under Section 302 (c). The Board of Tax Appeals should have decided that the respondent should not have included the property described in Trust No. 3 as part of decedent's gross estate under Section 302 (c).

2. The Board of Tax Appeals erred in failing to pass upon petitioners' assignment of error that Section 302 (c) is unconstitutional if applied to Trust No. 3 in this case.

[fol. 119] 3. The Board of Tax Appeals erred in holding that the entire value of the property included in all said trusts mentioned in this petition should be included in the gross estate of decedent for Federal Estate Tax under the provisions of Section 302 (d) because of the reservation of the powers to modify or alter expressed in Paragraph Tenth of said trust instruments. The Board of Tax Appeals erred in so holding as to all of said instruments and also in so holding as to each of them and also *as* in so holding as to either or any of them. The Board of Tax Appeals erred in failing to hold that if Section 302 (d) of the Revenue Act of 1926 requires the inclusion of the entire value of the property included in all of said trusts in the decedent's gross estate for Federal Estate Tax because of the provisions of Article Tenth of each of said instruments, then to such an extent the statute is unconstitutional and void.

4. The Board of Tax Appeals erred in failing to hold that none of the property described in any of the trusts mentioned in this petition should be included in decedent's gross estate for Federal Estate Tax purposes.

5. The Board of Tax Appeals erred in failing to hold that the payment by petitioners of $6,000. to the New North Country Community Hospital on account of the pledge by decedent to said institution was a proper deduction as a "claim against the estate" under Section 303 (a) (1) of the Revenue Act of 1926.

[fol. 120] 6. The Board of Tax Appeals erred in failing to hold that said payment on account of said pledge was a proper deduction as a transfer to or for the use of a corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, under Section 303 (a) (3) of the Revenue Act of 1926.

7. The Board of Tax Appeals erred in failing to hold that the payment by petitioners of $5,000. to Princeton University on account of the pledge by decedent to said institution was a proper deduction as a "claim against the estate," under Section 303 (a) (1) of the Revenue Act of 1926.

8. The Board of Tax Appeals erred in failing to hold that said payment to Princeton University on account of said pledge was a proper deduction as a transfer to or for the use of a corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, under Section 303 (a) (3) of the Revenue Act of 1926.

9. The Board of Tax Appeals erred in determining a deficiency of $10,676.35 in Federal Estate Tax on the Estate of William H. Porter, deceased.

10. The Board of Tax Appeals erred in not determining that there is due Petitioners a refund of $5,947.78, Federal Estate Tax overpaid on account of the said estate.

Wherefore your petitioners pray that the United States Circuit Court of Appeals for the Second Circuit review the action of the United States Board of Tax Appeals in [fol. 121] this case in holding that the property transferred in the aforesaid Trusts by the decedent, formed a

part of his taxable estate for Estate Tax purposes and in failing to allow as a deduction in determining the net taxable estate of decedent the amounts paid by the Executors of the decedent's estate on account of pledges made by the decedent during his lifetime and for which his estate was legally liable and in determining a deficiency in the Estate Tax in the amount of $10,676.35, that the said Court reverse the decision of the United States Board of Tax Appeals and direct the entry of a decision by said Board in favor of the petitioners determining that there is due the petitioners a refund of $5,947.78 on account of an over-payment of said Estate Tax, and your petitioners pray for such other and further relief as may to the Court appear proper in the premises.

Esther Jackson Porter, as Executrix, and Richard L. Davisson, as Surviving Executor, of the Estate of William H. Porter, Deceased, Petitioners. Address: 7 Dey Street, New York, N. Y. Edward N. Perkins, Counsel for Petitioners, 15 Broad Street, New York, N. Y.

[fols. 122 & 123] *Duly sworn to by Esther J. Porter and Richard L. Davisson. Jurats omitted in printing.*

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[fol. 124] Before United States Board of Tax Appeals

Docket No. 42815

Esther Jackson Porter, as Executrix, and Richard L. Davisson, as Surviving Executor, of the Estate of William H. Porter, Deceased, Petitioners,

vs.

Commissioner of Internal Revenue, Respondent

**Statement of Evidence**—Filed Feb. 17, 1932

Hearing at Washington, D. C., October 30, 1930

Appearances

Richard L. Davisson, Esq., Henry Mannix, Esq., and E. J. Corcoran, Esq., all of New York City, for the Petitioners.

L. S. Pendleton, Esq. (Clarence M. Charest, Esq., General Counsel, Bureau of Internal Revenue), for the Commissioner of Internal Revenue, Respondent.

[fol. 125] MOTION TO AMEND ANSWER

By Mr. Pendleton: "The respondent moves to amend his answer by alleging:

"(1) That in determining the deficiency tax shown in the sixty-day notice, dated December 22, 1928, the Commissioner excluded from the gross estate the value of a transfer in trust made October 18, 1918, in the sum of $107,500, made up of $105,625, corpus, and $1,875, accrued income; that in determining the deficiency as aforesaid the Commissioner excluded from the gross estate the value of a transfer in trust made on June 27, 1919, and not on February 1, 1919, as stated in the sixty-day notice, in the sum of $108,625, made up of $106,375, corpus, and $2,250, accrued income; that in excluding the value of the corpus of the two trust funds, he erred.

"(2) That there should be included in the gross estate of the decedent $105,625, representing the value of the transfer in trust made on October 18, 1918, and $106,375, representing the value of the transfer in trust made on June 27, 1919.

"(3) That the said transfers are taxable as a part of the decedent's gross estate under the provisions of Section 302 (d) of the Revenue Act of 1926.

"Wherefore it is respectfully prayed that the deficiency be increased in the proper amount."

[fol. 126] By the Member: "The motion is allowed. You will file that, please, as a written amendment."

By Mr. Pendleton: "I have it written. Yes, sir."

(The written amendment was thereupon filed by Mr. Pendleton, and made a part of this record.)

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REPLY TO AMENDMENT TO ANSWER

By Mr. Mannix: "If your Honor please, in reply to the amendment to the Commissioner's answer, respondent admits:

" 'That in determining the deficiency tax shown in the sixty-day notice, dated December 22, 1928, the Commissioner excluded from the gross estate the value of a trans-

fer in trust made October 18, 1918, in the sum of $107,500, made up of $105,625, corpus, and $1,875, accrued income; that in determining the deficiency as aforesaid the Commissioner excluded from the gross estate the value of a transfer in trust made on June 27, 1919, and not on February 1, 1919, as stated in the sixty-day notice, in the sum of $108,625, made up of $106,375, corpus, and in $2,250, accrued income;'

"The petitioner denies, however, in excluding the value of the corpus of the two trusts, the Commissioner erred. He denies such error.

"The petitioner further denies the allegation set forth in paragraph 2 of the amendment to the answer namely:

[fol. 127] " 'That there should be included in the gross estate of the decedent $105,625, representing the value of the transfer in trust made on October 19, 1918, and $106,375, representing the value of the transfer in trust made on June 27, 1919.'

"The petitioner further denies the allegation contained in paragraph 3 of the amendment to the answer namely:

" 'That the said transfers are taxable as a part of the decedent's gross estate under the provisions of Section 302 (d) of the Revenue Act of 1926'."

By Mr. Mannix: "May we have ten days or a week in which to submit the written reply?"

By the Member: "That will be all right."

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AMENDMENTS TO PETITION

By Mr. Davisson: "Your Honor, I now move the following amendments to the petition:

"I move to amend paragraph 4 of the petition so as to allege a new sub-paragraph, namely sub-paragraph (d), to read as follows:

"The error of the respondent in not allowing a credit against the Federal estate tax liability of the estate on account of the New York estate tax paid by said estate to this date, and to be paid within three years from the date of the filing of the Federal estate tax return.

"I also move to amend paragraph 5 of the petition so as to allege the necessary facts to support the error just referred to.

[fol. 128] "Accordingly, I move to amend paragraph 5 by adding a new sub-paragraph, to be sub-paragraph (u), reading as follows:

"Within three years after the filing of the Federal estate tax return for said estate, the executors actually paid to the State of New York the sum of $833,402.42, which said sum includes the payment of $750,000 referred to in the preceding paragraph, on account of the New York estate tax liability of the estate in respect of property included in the gross estate for Federal estate tax purposes, and petitioner claimed credit therefor within the said three year period with the respondent herein."

By Mr. Manning: "I hope your Honor will pardon us for presenting our amendments in such a halting manner, but we were faced with the necessity of making such amendments for the first time upon being advised by the respondent of the proposed increase, as covered by his amendment, in the deficiency.

"We move to further amend paragraph 5, by adding a new sub-paragraph, to be sub-paragraph (v), reading as follows:

" 'The estate will be required to pay a further amount on account of New York estate tax, in addition to that set [fol. 129] forth in sub-paragraph (u). If the increase in the deficiency as proposed in the amendment to the respondent's answer is sustained, said further New York estate tax will be 80% of the amount of the increase in the deficiency. The petitioner will pay said additional amount of New York estate tax by November 30, 1930, which will be within three years from the date of the filing of the Federal estate tax return. The petitioner hereby makes claim for credit for said further New York estate tax liability, and requests permission of the Board to submit subsequent to this hearing proof of said further payment'."

By the Member: "Is there any objection to those amendments?"

By Mr. Pendleton: "No objection, your Honor, I would like to have any opportunity to go over the proposed amendments after they have been written up, and reply."

By the Member: "Of course, if there is no objection, they will be granted, * * *."

PRIMUS E. GODRICH, being first duly sworn, testified as follows:

I am trust officer of Bankers Trust Company. I have been employed by Bankers Trust Company since 1913, first, as a clerk, then, as assistant trust officer from June 5, [fol. 130] 1917, and, later, as trust officer from January 16, 1923. In 1918 and 1919 I was an assistant trust officer. I had entire responsibility as such for the administration and handling of the two trusts created by Mr. Porter under date, October 18, 1918, and February 1, 1919, for the benefit of Helen Porter Davisson (Exhibits B and C to the petition in this proceeding).

By Mr. Mannix: "May we introduce in evidence at this point the petition as amended, together with the exhibits attached thereto?"

By the Member: "Is there any objection?"

By Mr. Pendleton: "No objection, your Honor."

By the Member: "Very well, they will be received in evidence."

By the witness, Mr. Godrich: I am familiar with the three instruments dated November 27, 1926, constituting Exhibits D, E, and F of the petition to this proceeding. I had personal knowledge in connection with the execution of those instruments. The instruments were prepared by Messrs. White & Case, attorneys for Mr. William H. Porter, and for the Bankers Trust Company, and after execution by Mr. Porter on November 27, 1926, were presented to me as assistant trust officer. I had to do with the negotiations leading up to the preparation of those instruments. On October 25, 1926, Bankers Trust Company re- [fol. 131] ceived from Mr. Porter a letter dated October 23, 1926, requesting a modification of his trust for the benefit of his daughter Mrs. Davisson, dated February 1, 1919, which was referred to White & Case, who were attorneys for Mr. Porter and the Bankers Trust Company, with the request that they make the instrument of modification requested by Mr. Porter. The letter now shown me from me to Messrs. White & Case dated October 25, 1926, is an original letter of that date forwarding Mr. Porter's original letter of October 23, 1926, and requesting the modification of the agreement.

(Letter offered and received in evidence as Petitioner's Exhibit No. 1.)

By Mr. Davisson: "May I have leave to file a photostatic copy of the letter instead of the original?"
By the Member: "I assume there is no objection to that."
By Mr. Pendleton: "No objection to that."
By the Member: "All right, sir."

(The document so offered and received in evidence was marked Petitioner's Exhibit No. 1 and made a part of this record.)

By the witness, Mr. Godrich: I do not know where the original of Mr. Porter's letter dated October 23, just referred to, is. I personally have searched the files of the Bankers Trust Company and White & Case have also searched their files without success. I really looked through [fol. 132] the files of White & Case myself because I was positive they had it. The original letter shown me from White & Case to Bankers Trust Company dated October 25, 1926, was received by the Bankers Trust Company, but we have been unable to find it in our files. I personally have searched all the files of Bankers Trust Company where that letter might be filed without success.

(Carbon copy offered and received in evidence without objection as Petitioner's Exhibit No. 2.)

By Mr. Davisson: "May I put the photostat copy in?"
By the Member: "I presume there is no objection to that."
By Mr. Pendleton: "No objection."
By the Member: "Very well."

(The document so offered and received in evidence was marked Bankers Exhibit No. 2 and made a part of the record.)

By the witness, Mr. Godrich: I have been in the employ of Bankers Trust Company for eighteen years continuously, first, as clerk in the trust department, and I am familiar intimately with the filing system of that department and have daily occasion to refer to papers in that filing system. I requested our filing department to present to me all the files relating to transactions with Mr. Porter in connection with the various trusts since the inception of

each trust. In addition I requested our filing department [fol. 133] to refer to me files of similar name. I have exhausted every means at my disposal that would enable me to locate the original letter and I am firmly convinced it is misfiled or lost. I believe that when this letter was returned by Messrs. White & Case in their letter of October 25, 1926, that I received a letter from Mr. Porter and sent it by hand to Messrs. White & Case who are on the twenty-fifth floor of our building. There is a letter from White & Case dated October 25, 1926, returning the instrument and modification; also Mr. Porter's letter of October 23, 1926.

By Mr. Pendleton:

Q. "In this letter of October 25, 1926, addressed to Bankers Trust Company, it is stated "'We also return the papers which accompanied your letter.' And at the bottom there is marked 'Enclosure'. Have you any recollection of what the enclosure was?

A. The enclosure was the photostat copy of Mr. Porter's trust agreement, dated February 1, 1919, which we submitted to counsel, in order that they might prepare the necessary instrument of revocation requested by Mr. Porter; second, Mr. Porter's letter of October 23, 1926, and third, the instrument of revocation which I had requested them to prepare in my letter of October 25, 1926."

[fol. 134] Q. "You just referred to this as revocation?

A. Instrument of revocation."

Q. "Well, which is right?

A. Instrument of modification."

"By Mr. Davisson:

Q. "You are quite clear in your mind that what Mr. Porter asked you to do was a modification and not a revocation?

A. Absolutely. Why I am so emphatic on that point is by reason of the fact that Mr. Porter called us on the telephone and asked why we had referred to his trust agreement, dated February 1, 1919 as 'Trust No. 2'. We responded by saying that he had made a prior trust agreement dated October 18, 1918, which we had designated as 'Trust No. 1', in order to differentiate the two trusts. That brought to Mr. Porter's mind the thought that he had another trust with Bankers

Trust Company, and in a subsequent letter he requested the modification of the first agreement along similar lines that he had requested the modification of the 1919 agreement."

(The respondent's objection to the introduction parol testimony of the contents of the letter as not being the best evidence was overruled and the respondent was allowed an exception.)

By Mr. Pendleton: "Yes, I would like to have an exception, your Honor."

By the Member: "All right, sir."

[fol. 135] By the witness, Mr. Godrich: The letter in question was a request from Mr. Porter, directing a modification of his trust, dated February 1, 1919, in order to provide for two grandchildren who were born after the date of the instrument. The original instrument as executed by him directed the payment of income to his daughter for life, or until she reached the age of thirty, and upon her death leaving her son Richard L. Davisson, Jr., then the trust was to continue for his benefit until he reached the age of thirty, but Mr. Porter, realizing that in 1926 two other grandchildren were born to his daughter, wished to provide for them in the same manner that he had provided for Richard L. Davisson, and consequently requested Bankers Trust Company to procure a modification of the agreement. This carbon copy of a letter, dated Octobed 25, 1926, addressed to Mr. William H. Porter re Helen Porter Davisson Trust No. 2, is a carbon copy of my letter enclosing the modification of the agreement prepared by White & Case, which was delivered to Mr. Porter.

Mr. Davisson: "I offer this letter in evidence (handing the letter to Mr. Pendleton).

Mr. Pendleton: "I object to it, your Honor, on the ground that the failure to produce the original has not been proved."

Mr. Davisson: "I am going on the stand, your Honor—I can do it now, if you wish—to testify that I, as executor, received from Mr. Porter's secretary all of his correspond-[fol. 136] ence files, and they are now in my office, and I have searched diligently through those files for the original, and cannot find it."

The Member: "I understood the witness that that was a carbon copy. That is practically a duplicate original, as I understand it. That is what a carbon means."

Mr. Davisson: "Yes, sir."

The Member: "The objection is overruled, and an exception noted."

Mr. Pendleton: "An exception; yes, sir."

(The document so offered and received in evidence was marked Petitioners' Exhibit No. 3 and made a part of this record.)

By the witness, Mr. Godrich: I personally dictated the letter and placed my initial "G" on the letter at the time the letter was dictated. On this very paper. This carbon copy of a letter, dated October 28, 1926, addressed to Mr. William H. Porter and signed by H. F. W., vice-president, was written in response to Mr. Porter's inquiry over the telephone asking why we had indicated in our letter of October 25th "Helen Porter Davisson Trust No. 2". This letter explains to Mr. Porter that he has established two agreements, one dated February 1, 1919, which Mr. Porter referred to in his letter of October 23, 1926, requesting a modification of the agreement, and a prior trust desig- [fol. 137] nated as Trust No. 1, dated October 18, 1918. This letter was presented by me to Mr. Porter personally.

(Letter offered and received in evidence over Mr. Pendleton's objection, to whom an exception was allowed, and to Mr. Davisson's request, and without objection a photostat was permitted to be filed. The document so offered and received in evidence was marked Petitioner's Exhibit No. 4 and made a part of this record.)

By the witness, Mr. Godrich: H. F. W., whose initials are on the Exhibit No. 4, is senior vice-president of Bankers Trust Company in charge of the trust department, and his name is "H. F. Wilson, Jr." This original letter signed "Wm. H. Porter" and addressed to Bankers Trust Company, October 29, 1926, came into my hands as assistant trust officer on October 30, 1926. It is produced from the file of Bankers Trust Company.

(Letter offered and received in evidence and, on Mr. Davisson's request, a photostat permitted to be filed in lieu of the original. The document so offered and received in evidence was marked Petitioner's Exhibit No. 5 and made a part of this record.)

By the witness, Mr. Godrich: After the correspondence just introduced in evidence White & Case prepared the necessary instruments and these were executed by Mr. Por- [fol. 138] ter November 27, 1926, and delivered to me as assistant trust officer to Bankers Trust Company. Exhibits D, E, and F attached to the petition are photostat copies of the original instrument signed by Mr. Porter. Other than these three instruments there were no alterations, modifications, or revocations of any nature made to the original trusts, dated October 18, 1918, and February 1, 1919, being Exhibits B and C of the petition in this proceeding. The trust deed of October 18, 1918, and that dated February 1, 1919, Exhibits B and C attached to the petition, specify certain securities delivered to Bankers Trust Company under those instruments and those are the securities which in fact were delivered to the Bankers Trust Company on or about the dates of those instruments. Bankers Trust Company still has those securities. I inspected them yesterday morning, comparing the securities listed in the instruments with those on file in our vault and they are the original securities delivered under the first agreement dated October 18, 1918, and the second agreement dated February 1, 1919. Bankers Trust Company neither, before nor after, nor during the execution of the instruments surrendered the sole possession of these securities, and if Mr. Porter had handed me an instrument purporting to revoke the trust and demanding the return of the securities I would not have delivered them to him. Bankers Trust Company is now holding under the instruments, Exhibits D, E, and F to the petition in this proceeding, the original [fol. 139] securities delivered them under the two trusts delivered them in 1918 and 1919 for the benefit of Helen Porter Davisson. There have been no sales or reinvestments of any of the original property delivered by Mr. Porter to Bankers Trust Company as trustee in 1918 and 1919 under said instruments. We hold the original securities delivered to us by the donor on the respective dates. Bank-

ers Trust Company has not, and will not, receive any commission on the principal of these trust funds. The securities of these trusts are held in our vault and the income is remitted to the beneficiary semi-annually on the date of collection. There has never been any refusal on Mrs. Davisson's part to accept the income remitted to her. In regard to my testimony as to the motive or purpose of the decedent in writing the letters introduced in evidence, I am not merely stating my conclusion. I base this on three grounds: First, on my letter of October 25, 1926, to White & Case requesting White & Case to prepare a modification of the agreement to meet the donor's wishes; second, a letter addressed to the donor enclosing the instrument of modification expressly stated in my letter to Mr. Porter; third, on Mr. Porter's own letter, dated October 28, 1926, requesting a modification of the trust dated October 18, 1918. In none of those letters was there a word of revocation mentioned, merely a modification. My statements in reference to the contents of Mr. Porter's letter of October 23, 1926, would not represent merely my construction placed on what he said in that letter. I have independent [fol. 140] recollection of the terms of that communication because this was the only transaction in which I ever had direct dealings with Mr. Porter and it was a matter of personal gratification to me that I should have the privilege of conferring with one of the captains of industry in the United States. I knew Mr. Porter's personal affairs with the Bankers Trust Company as embraced in those trusts. I had two or three personal conversations with Mr. Porter about these trusts touching the instruments of 1926, and he stated that the purpose was to provide for two grandchildren born subsequently to the original instrument.

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Mr. Richard L. Davisson, being first duly sworn, testified as follows:

I am one of the petitioners and surviving executors of William H. Porter's estate.

Stipulation as to Certain Facts

By Mr. Mannix: "It is stipulated and agreed by and between counsel for petitioner and counsel for the respondent that:

"On May 12, 1927, payment was made to James W. Townsend, treasurer of the New North Country Community Hospital the sum of $6,000 as the balance of a written subscription or pledge of $12,000 made by decedent during his lifetime to the New North Country Community Hospital at Glen Cove, Long Island. This subscription was made by [fol. 141] decedent, William H. Porter, for the specific purpose of equipping an X-Ray room in the said hospital as a memorial to his son, who lost his life in the World War. During the decedent's lifetime, the construction of said hospital was actually undertaken, and an X-Ray room was provided therein in reliance on said promise of decedent.

"It is further stipulated and agreed by and between counsel for the respective parties that:

"On May 12, 1927, there was paid to Princeton University the sum of $5,000 as the balance of a subscription of $25,000 made by decedent during his lifetime for the purpose of erecting in the University Chapel to be built at Princeton, New Jersey, a bay containing a Memorial Window in memory of decedent's son who lost his life in the World War. Princeton University had procured drawings and sketches of such bay and window to be made and had actually contracted for and commenced construction of the same during decedent's lifetime in reliance on said subscription.

"The petitioner now withdraws the claim for a deduction in computing the net estate on account of the remaining pledges referred to in paragraph 5 of the petition, aggregating some $2,025. In other words, the only claim for deduction made on account of payments under pledges is [fol. 142] for the $6,000 payment made to the New North Country Community Hospital and for the $5,000 payment made to Princeton University.

"It is further stipulated that the payments referred to in the foregoing stipulation were made by the executors of the estate on the date referred to therein, namely May 12, 1927.

"It is further stipulated that no deduction was allowed to the estate in computing the net estate for the sums paid by the estate on account of said pledges."

"Mr. Pendleton: That stipulation is satisfactory to the respondent, your Honor. He joins in it. The effect of it is merely to admit the facts alleged in paragraphs (m)

and (n) on page 9 of the petition, and the paragraph following is (r) on page 10, and petitioner withdraws his allegations of error as to paragraphs (o), (p) and (q)."

By the witness, Mr. Davisson: As executor I have possession of Mr. Porter's files which purport to be the full and complete files. I got them from the firm of J. P. Morgan & Company, out of Mr. Porter's private office. I have searched those files for the purpose of locating the carbon copy of the letter written October 23, 1926, to Bankers Trust Company, which Mr. Goodrich referred to in his testimony. I also tried to locate the original letter from the Bankers Trust Company to Mr. Porter, dated October [fol. 143] 25, 1926, and the original letter from Bankers Trust Company to Mr. Porter, dated October 28, 1926. I was not able to find either the copies of these letters or the originals. I personally searched through the files and my associate Mr. Corcoran who is here checked my search. We both failed to discover them. I got Mr. Porter's former secretary Mr. Matthews, who had kept the files, to spend several hours going through them. I cannot explain the absence of the missing letters. There is only one other place where those letters might be. Some papers, all supposed to antedate this period by a number of years were taken by Mrs. Porter to her house. At my request Mrs. Porter and Mr. Matthews, the former secretary, went there yesterday and went through these papers hoping to find these documents, but with no result.

(On behalf of the respondent, trust indenture dated the 18th of October, 1918, between William H. Porter and Bankers Trust Company endorsed "Jamie Porter Trust No. 1" was offered and received in evidence without objection marked Respondent's Exhibit A and made a part of this record; photostatic copy of trust indenture between William H. Porter and Bankers Trust Company, dated June 27, 1919, endorsed "Jamie Porter Trust No. 2" was offered and received in evidence without objection marked Respondent's Exhibit B and made a part of this record; [fol. 144] letter dated September 29, 1928, addressed to Richard L. Davisson, et al., Executors, Estate of William H. Porter, known as tentative or thirty-day deficiency letter, was offered and received in evidence without objection for

the purpose of showing the computations marked Respondent's Exhibit C and made a part of this record.)

It is stipulated and agreed that the foregoing is a true and correct statement of the evidence upon the trial of this case relating to the issues involved in the petition for review by the Circuit Court of Appeals, and that it may be approved and ordered filed accordingly.

Edward N. Perkins, Attorney and Counsel for the Petitioner. C. M. Charest, Counsel for Respondent.

Approved and ordered filed February 17th, 1932.

Eugene Black, Member United States Board of Tax Appeals.

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[fol. 145] PETITIONER'S EXHIBIT No. 1

(Letterhead of Bankers Trust Company)

16 Wall Street,
New York, October 25, 1926.

Re Helen Porter Davisson Trust No. 2

Messrs. White & Case, 14 Wall Street, New York City.

GENTLEMEN: We enclose herewith photostat copy of Agreement, dated February 1, 1919, between William H. Porter and this Company, for the benefit of his daughter, Helen Porter Davisson.

We also enclose letter, dated October 23rd, from Mr. Porter, directing a modification of the agreement to provide for the payment of principal, upon the death of his daughter, to her children then living, and, if none, to his granddaughter, Jamie (Jane Hethering) Porter. I assume it will meet with the approval of Mr. Porter to provide in the modification that, should any of Mrs. Davisson's children die with issue, such issue shall take the share its parents would have taken, if living.

Will you please prepare this document as soon as possible?

Very truly yours, P. E. Godrich, Trust Officer.

PEG.KD.
#16.
Encls. By Hand.

[fol. 146] PETITIONER'S EXHIBIT No. 2

HDS:B. October 25, 1926.

Re Helen Porter Davisson Trust No. 2

Bankers Trust Company, 16 Wall Street, New York, N. Y.

DEAR SIRS:

Attention Mr. Godrich

In compliance with the request contained in your letter of October 25th, we have prepared and we enclose a modification of the Trust Agreement. We also return the papers which accompanied your letter. We have adopted your suggestion as to the issue of Mrs. Davisson's children.

Very truly yours, —— ——.

Enclosure.

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[fol. 147] PETITIONER'S EXHIBIT No. 3

October 25, 1926.

Re Helen Porter Davisson Trust No. 2

Mr. William H. Porter, 45 East 68th Street, New York City.

MY DEAR MR. PORTER: I have pleasure in acknowledging receipt of your favor of the 23rd instant and shall have our attorneys prepare, in your behalf, a modification of your agreement, dated February 1, 1919, for the benefit of your daughter, Helen Porter Davisson, to provide for the payment of the principal, upon the death of Mrs. Davisson, to her three children, or surviving issue then living, and, if none, then to your grand-daughter, Jamie (Jane Hethering) Porter.

We have made proper notation on our records that the correct name of your grand-daughter is Jamie Porter.

Just as soon as we receive the instrument of modification from our attorneys, I shall immediately send it to you for signature.

With kindest personal regards, I am

Sincerely yours, W., Jr., Vice-President.

[fol. 148] PETITIONER'S EXHIBIT No. 4

October 28, 1926.

Mr. William H. Porter, 45 East 68th Street, New York City.

DEAR MR. PORTER: Referring to ours of October 25th and our subsequent conversation by telephone, we headed our letter—"Re: Helen Porter Davisson Trust No. 2"—because in your favor to us of October 23rd you referred to the Deed of Trust dated February 1, 1919 which we call "Trust No. 2", Trust No. 1 being the Indenture dated October 18, 1918.

We have had our counsel prepare a modification of the Trust Agreement of February 1, 1919 and understand we are to have the pleasure of a conference with you in the near future. If it would better suit your convenience I would be glad to have our Trust Officer, Mr. Godridge, call upon you.

Very sincerely yours, W., Jr., Vice-President.

HFW, Jr. MWC.
16.

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[fol. 149] PETITIONER'S EXHIBIT No. 5

Received Oct. 30, 1926. Personal Trusts. Ans. 10/30/26 by P. E. G.

23 Wall Street, New York

October 29, 1926.

Bankers Trust Company, 16 Wall Street, New York City.

GENTLEMEN: Referring to the agreement contained in the Deed of Trust of the undersigned to you, dated October 18, 1918, the said deed, among other things, provided that in case of the death of Helen Porter Davisson, that one-quarter of the amount of said Trust shall go to Richard L. Davisson if living, and the remaining three-quarters shall go to the children of Helen Porter Davisson then living.

Inasmuch as the situation has changed considerably since said Deed of Trust was executed, and Richard L.

Davisson does not now need any consideration; and inasmuch as the said Deed provides that I may change the terms thereof if I see fit, now, therefore I wish to cancel the provision whereby Richard L. Davisson shall receive one-quarter of the amount covered by said Deed and Richard L. Davisson, Jr., three-quarters; and inasmuch as [fol. 150] Helen Porter Davisson now has three children, I wish to arrange that the full amount covered by said Deed shall go to the children of Helen Porter Davisson then living, and if there be no children of Helen Porter Davisson then living it shall go to Jane Hetherington Porter (so called) at the time said Deed of Trust dated October 18, 1918 was executed.

This is to advise you that the said Jane Hetherington Porter, so called, had not then been christened. When she was christened she was given the name of Jamie Porter in memory of her father, James Jackson Porter, who was killed in the World War, in the Argonne Forest in October 1918.

Please note accordingly on your books; and oblige,

Very truly yours, Wm. H. Porter.

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[fol. 151] PETITIONER'S EXHIBIT No. 6

Estate of William H. Porter, 7 Dey Street

Telephone: Rector 4726

New York, October 28, 1930.

MT-ET-C1 4896-JEK.

Re Estate of William H. Porter, deceased, First District New York

Commissioner of Internal Revenue, New Internal Revenue Building, Washington, D. C.

DEAR SIR: The undersigned as the Surviving Executors of the Estate of William H. Porter, deceased, hereby claim credit against the Federal Estate Tax liability of said Estate due under the Revenue Act of 1926 for New York Estate Taxes actually paid in the amount of $833,402.42. The said amount represented the difference between eighty percent of the Federal Estate Tax liability of $1,325,321.98 determined in Treasury Department letter dated December

22, 1928 (MT-ET-C1 4896-JEK) and the total amount of other state inheritance taxes actually paid in the sum of $226,855.16. The said New York Estate Taxes and other state inheritance taxes were paid in respect of property included in the gross Estate for Federal Estate Tax purposes.

[fol. 152] Photostat copies of three receipts of the New York State Tax Commission, evidencing the payment of said New York Estate Tax, are attached as follows:

| | |
|---|---|
| Receipt No. 20, dated May 26, 1927 | $300,000.00 |
| Receipt No. 85, dated May 25, 1928 | 450,000.00 |
| Receipt No. 596, dated October 25, 1930 | 83,402.42 |
| | $833,402.42 |

Since the computation of the New York Estate Tax is dependent upon the amount of Federal Estate Tax as finally determined, and since there is now pending before the Board of Tax Appeals a proceeding contesting the Commissioner's determination of the Federal Estate Tax liability in this Estate, the New York State Tax Commission has not yet rendered a final determination of the New York Estate Tax liability of said Estate and cannot do so until the Federal Estate Tax liability is definitely settled. The Executors are, therefore, not in a position to submit final receipts evidencing the payment of the New York Estate Tax, as required by the Regulations.

Very truly yours, Esther Jackson Porter and Richard L. Davisson, as Surviving Executors of William H. Porter, Deceased, by T. N. Stryker, Executor.

RLD:MCP.

[fol. 153] (Photostat Copy)

Form TT68. 10-7-25-2000 (26-2137).
Amount Paid: $300,000.00.

State of New York Tax Department

Temporary Receipt

Albany, May 26, 1927.

No. 20.

Received from Esther J. Porter, Richard L. Davisson, Herbert K. Twitchell, Ex'rs the sum of Three hundred

thousand & 00/100 Dollars being payment on account of the Estate Tax due upon the Estate of William H. Porter late of Nassau County, deceased.

Under Article 10-B of the Tax Law: Upon a final determination and assessment of tax and the surrender of this temporary receipt the final receipt in duplicate prescribed by law will be furnished.

State Tax Commission, by —— ——, Deputy Tax Commissioner.

[fol. 154] Form TT68. 10-7-25-2000 (26-2137).

Amount Paid: $83,402.42.

State of New York Tax Department

Temporary Receipt

Albany, Oct. 25, 1930.

No. 596.

Received from Esther J. Porter, Richard L. Davisson, Ex'rs. the sum of Eighty-three thousand four hundred two and 42/100 Dollars, being payment on account of the Estate Tax due upon the Estate of William H. Porter late of Nassau County, deceased.

Under Article 10-B of the Tax Law: Upon a final determination and assessment of tax and the surrender of his temporary receipt the final receipt in duplicate prescribed by law will be furnished.

State Tax Commission, by T. N. Stryker, Deputy Tax Commissioner.

[fol. 155] Form TT68. 10-7-25-2000 (26-2137).

Amount Paid: $450,000.00.

State of New York Tax Department

Temporary Receipt

Albany, May 25, 1928.

No. 85.

Received from Esther J. Porter, Richard L. Davisson and Herbert K. Twitchell, Exrs., the sum of Four hundred fifty thousand and no/100 Dollars, being payment on

account of the Estate Tax due upon the Estate of William H. Porter late of Nassau County, deceased.

Under Article 10-B of the Tax Law: Upon a final determination and assessment of tax and the surrender of his temporary receipt the final receipt in duplicate prescribed by law will be furnished.

State Tax Commission, by T. N. Stryker, Deputy Tax Commissioner.

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[fol. 156] RESPONDENT'S EXHIBIT A

William H. Porter

to

Bankers Trust Company

Deed of Trust Dated October 18, 1918

This indenture, made the 18th day of October, 1918, between William H. Porter, of Glen Cove, Nassau County, New York, party of the first part (hereinafter called the "Donor"), and Bankers Trust Company, a corporation of the State of New York, having its principal offices in the Borough of Manhattan, City and State of New York, party of the second part (hereinafter called the "Trustee").

Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned,

Now, therefore, this indenture witnesseth, that in consideration of the premises, the mutual covenants herein [fol. 157] contained, and of other good and valuable considerations, and of the sum of One Dollar ($1.00) to him in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Donor has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assign, set over and deliver unto said Trustee, its successors and assigns, the following described property and securities, to wit:

$100,000 City of New York 4½% Bonds, due July 1, 1967, coupons due January 1 and July 1, issued for rapid transit construction.

Together with the appurtenances, and all the estate and rights of the Donor.

To have and to hold all and singular the above granted and described property and securities unto said Trustee, its successors and assigns, in trust nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

First. To receive, hold, manage, sell, invest and reinvest the same and every part thereof, in the manner hereinafter specified, and to collect, recover and receive the rents, issues, interest, income and profits thereof, and after deducting the commissions of the Trustee as hereinafter provided, and the proper and necessary expenses in connection [fol. 158] with the administration of the trust, to pay over the balance thereof, hereinafter called "Income" unto James J. Porter, the son of the Donor, until he shall attain the age of thirty years, and thereupon to convey, transfer and pay over to him, the said James J. Porter, the principal of this trust for his own use absolutely and forever.

In case of the death of said James J. Porter before he shall attain the age of thirty years, then upon his death to continue the trust for the benefit of his daughter Jane Hetherington Porter, and during her minority to apply such amount of income for the maintenance, education and support of said Jane Hetherington Porter as in the judgment of her mother Margaret K. Porter may be necessary, and to accumulate the balance during minority, and upon the said Jane Hetherington attaining her majority to pay over to her the accumulation of income, if any, and thereafter the income upon the trust until she shall attain the age of thirty years, at which time to convey, transfer and pay over the principal of the trust to said Jane Hetherington Porter for her own use absolutely and forever.

In case of the death of Jane Hetherington Porter before she shall attain the age of thirty years (but only in the event of the death of James J. Porter before he shall attain the age of thirty years), to convey, transfer and pay over one-fourth of the principal of the trust to Margaret K. Porter, if then living, and the balance thereof or the entire principal of the trust, if said Margaret K. Porter shall not [fol. 159] then be living, to the issue of said Jane Hether-

ington Porter in equal shares, and in default of issue surviving said Jane Hetherington Porter, then such balance thereof or the entire principal of the trust, if said Margaret K. Porter shall not then be living to Helen Porter Davisson, daughter of the Donor, for her own use, and in case of her prior death, in equal shares to the issue of said Helen Porter Davisson then living.

Second. The Trustee is authorized and empowered to retain, subject to the provisions hereof, any and all of the securities hereinbefore described in their present form, and also such additional properties as the Donor may from time to time add to the trust estate.

All investments or reinvestments made by the Trustee shall be subject to the control and written directions of the Donor during his lifetime, and the Trustee shall be fully protected in making any sale, investment or reinvestment as shall be directed by the Donor in writing during his lifetime and shall not be liable in any way for depreciation or loss incurred by reason of such sale, investment or reinvestment.

In the absence of any such written directions from the Donor, the Trustee shall be authorized to make such sales, investments or reinvestments as to the Trustee may seem proper and to the advantage of the estate, without regard to the investments prescribed by the laws of the State of New York for legal trust investments.

Upon the death of the Donor all investments or reinvestments shall be left to the discretion and judgment of the [fol. 160] Trustee, with full power and authority to retain any and all securities constituting the principal of the trust fund, and all further sales, investments or reinvestments shall be subject only to the control and discretion of the Trustee, and the Trustee shall not necessarily be limited to those securities prescribed by the laws of the State of New York for legal trust investments.

Subject to the limitations above prescribed, the Trustee shall have full power to sell and transfer any and all of said securities or any other property, real or personal, that may be taken under the terms of the trust, and to execute and deliver sufficient assignments, releases or satisfactions of bonds and mortgages, or other securities, or to sell and convey any real estate forming part of the trust estate and

to execute, acknowledge and deliver good and sufficient deed or deeds of conveyance therefor.

No purchaser upon any sale by the Trustee shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the validity, expediency or propriety of any such sale.

Third. In any case in which the Trustee is required, pursuant to the provisions of this indenture to divide the principal of the trust estate into parts or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind, or partly in kind and partly money, and for the purpose of such allotment the judgment of the Trustee con- [fol. 161] cerning the propriety thereof, and the relative value for the purpose of division or distribution of the property and securities so allotted, shall be binding and conclusive on all persons and corporations interested therein.

Fourth. Subject to the limitations above prescribed, the Trustee is authorized and empowered to vote in person or by proxy upon all stocks or other securities held by it; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at such times and upon such terms and conditions as the Trustee shall deem proper; to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation, or to the lease by any person or corporation of his or its property or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger, sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities of any corporation, and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities, and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds [fol. 162] or other investments held by the Trustee here-

under all rights, powers and privileges as are or may be lawfully exercised by any person owning similar property in his own right provided, however, that the Trustee shall not be required to make any of the payments herein provided, except from the principal of the trust found, or from funds furnished for the purpose by the Donor.

In the event that the Trustee shall request from the Donor written instructions as to the action which it shall take in regard to any of the matters set forth in this paragraph, and the Donor shall neglect or refuse to furnish such instructions for a period of ten (10) days, or in the event that the Donor shall be unable for any reason to furnish such instructions, the Trustee is hereby authorized and empowered to take such action in regard to such matters as it may deem proper and desirable.

The Donor hereby expressly reserves to himself the privilege of increasing the principal of the trust estate, at any time by adding thereto personal property and securities which the Trustee shall receive, hold, manage, sell, invest and reinvest in the same manner as hereinbefore specified in respect of the securities forming part of the original fund.

Fifth. The Trustee may in its sole discretion cause the securities which may from time to time comprise the trust fund, or any part thereof, to be registered in its name as Trustee hereunder, or in its own name, or in the name of [fol. 163] its nominee, or to take and keep the same unregistered, and to retain them or any part thereof, in such condition that they will pass by delivery.

Sixth. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust, a commission of one per cent. (1%) per annum upon income, and is hereby authorized to deduct such commission before paying the income to the beneficiary hereunder.

The Trustee also shall be entitled to a commission of one per cent. (1%) upon the market value of the trust fund when and as the trust shall terminate upon the death of the beneficiary above named.

The Trustee is also authorized, in the discharge of its duties, to employ counsel and agents and to determine and pay to them reasonable compensation, and it shall be entitled to reimbursement for the same, and for such other

expenses and charges as it may deem necessary and proper to incur.

Seventh. The Donor covenants and agrees to make, execute and deliver in due form of law such other and further assignments, conveyances or other instruments as the Trustee may deem requisite or necessary to effectuate the purposes hereof.

Eighth. The Trustee is further authorized and empowered to pay out of the income received from the trust fund any and all taxes which properly may become payable [fol. 164] from time to time, under the laws of the United States, or of any State, County or Municipality on said trust property, or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

Ninth. In case of securities taken or purchased for said trust fund at a premium, the Trustee shall not be bound to set aside any part of the income thereof as a sinking fund to retire or absorb such premium.

Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument [fol. 165] shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this

indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned.

Eleventh. The Trustee by joining in the execution of this instrument, signifies its acceptance of the trust.

Twelfth. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by a Vice-President, and its corporate seal to be hereunto affixed and at- [fol. 166] tested by an Assistant Secretary as of the day and year first above written.

Wm. H. Porter. (Seal.) Signed, sealed and delivered in the presence of T. F. Mallaby. Bankers Trust Company, by F. N. B. Close, Vice-President. Attest: (Illegible,) Assistant Treasurer.

STATE OF NEW YORK,
County of New York, ss:

On this 18th day of October, 1918, before me personally came William H. Porter, to me known and known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

William R. Merrick.

STATE OF NEW YORK,
County of New York, ss:

On this 18th day of October, 1918, before me personally came F. N. B. Close, to me known, who, being by me duly

[fol. 167] sworn, did depose and say that he resides at Cranford, New Jersey; that he is a Vice-President of Bankers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

J. F. Grodley.

We hereby certify that the foregoing is a true copy of the original document.

Bankers Trust Company. P. E. Godridge.

Bankers Trust Company, New York. Supporting Schedule E. Jamie Porter Trust No. 1.

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[fol. 168] RESPONDENT'S EXHIBIT B

William H. Porter

to

Bankers Trust Company

Deed of Trust Dated June 27, 1919

This Indenture made the 27th day of June, 1919, between William H. Porter, of Glen Cove, Nassau County, New York, party of the first part (hereinafter called the "Donor"), and Bankers Trust Company, a corporation of the State of New York, having its principal offices in the Borough of Manhattan, City and State of New York, party of the second part, hereinafter called the "Trustee").

Whereas, the Donor desires to create a trust of the property and for the purposes hereinafter mentioned.

Now, therefore, this Indenture witnesseth, That in consideration of the premises, the mutual covenants herein contained, and of other good and valuable considerations, [fol. 169] and of the sum of One Dollar ($1.00) to him in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the Donor has granted, conveyed, assigned,

set over and delivered, and by these presents does grant, convey, assign, set over and deliver unto said Trustee, its successors and assigns, the following described property and securities, to wit:

$100,000 City of New York 4½% Corporate Stock, due June 1965; $50,000 of which stock was issued for the supply of water, and the remaining $50,000 for rapid transit construction,

Together with the appurtenances, and all the estate and rights of the Donor.

To have and to hold all and singular the above granted and described property and securities unto said Trustee, its successors and assigns, in trust nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

First. To receive, hold, manage, sell, invest and reinvest the same and every part thereof, in the manner hereinafter specified, and to collect, recover and receive the rents, issues, interest, income and profits thereof, and after deducting the commissions of the Trustee as hereinafter provided, and the proper and necessary expenses in connection [fol. 170] with the administration of the trust, to accumulate the balance thereof, hereinafter called "Income" for the benefit of Jane Hetherington Porter, a granddaugter of the Donor, during her minority, with the express authority, however, during such minority to apply such amount of the income as to the Trustee may seem necessary and proper for the maintenance, education and support of said Jane Hetherington Porter, and upon her majority to pay over to said Jane Hetherington Porter, the accumulation of income, if any, and thereafter the income upon the trust and until she shall attain the age of thirty-five years, at which time to convey, transfer and pay over the principal of the trust fund to said Jane Hetherington Porter for her own use, absolutely and forever.

In case of the death of Jane Hetherington Porter before she shall attain the age of thirty-five years, to convey, transfer and pay over the principal of the trust fund in equal shares to the children of said Jane Hetherington Porter, and in default of children surviving said Jane Hetherington Porter, then to Helen Porter Davisson,

daughter of the Donor, for her own use, and in case of her prior death, in equal shares, to the children of said Helen Porter Davisson then living.

Second. The Trustee is authorized and empowered to retain, subject to the provisions hereof, any and all of the securities hereinbefore described in their present form, and also such additional properties as the Donor may from [fol. 171] time to time add to the trust estate.

All investments or reinvestments made by the Trustee shall be subject to the control and written directions of the Donor during his lifetime, and the Trustee shall be fully protected in making any sale, investment or reinvestment as shall be directed by the Donor in writing during his lifetime and shall not be liable in any way for depreciation or loss incurred by reason of such sale, investment or reinvestment.

In the absence of any such written directions from the Donor, the Trustee shall be authorized to make such sales, investments or reinvestments as to the Trustee may seem proper and to the advantage of the estate, without regard to the investments prescribed by the laws of the State of New York for legal trust investments.

Upon the death of the Donor all investments or reinvestments shall be left to the discretion and judgment of the Trustee, with full power and authority to retain any and all securities constituting the principal of the trust fund, and all further sales, investments or reinvestments shall be subject only to the control and discretion of the Trustee, and the Trustee shall not necessarily be limited to those securities prescribed by the laws of the State of New York for legal trust investments.

Subject to the limitations above prescribed, the Trustee shall have full power to sell and transfer any and all of said securities or any other property, real or personal, that may be taken under the terms of the trust, and to execute [fol. 172] and deliver sufficient assignments, releases or satisfactions of bonds and mortgages, or other securities, or to sell and convey any real estate forming part of the trust estate and to execute, acknowledge and deliver good and sufficient deed or deeds of conveyance therefor.

No purchaser upon any sale by the Trustee shall be bound to see to the application of the purchase money arising

therefrom, or to inquire into the validity, expediency or propriety of any such sale.

Third. In any case in which the Trustee is required, pursuant to the provisions of this indenture to divide the principal of the trust estate into parts or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind, or partly in kind and partly money, and for the purpose of such allotment the judgment of the Trustee concerning the propriety thereof, and the relative value for the purpose of division or distribution of the property and securities so allotted, shall be binding and conclusive on all persons and corporations interested therein.

Fourth. Subject to the limitations above prescribed, the Trustee is authorized and empowered to vote in person or by proxy upon all stocks or other securities held by it; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at such times and upon such terms and conditions as the [fol. 173] Trustee shall deem proper; to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation, or to the lease by any person or corporation of his or its property or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger, sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities of any corporation, and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities, and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds or other investments held by the Trustee hereunder all rights, powers and privileges as are or may be lawfully exercised by any person owning similar property in his own right, provided, however, that the Trustee shall not be required to make any of the payments herein provided, except from the principal of the trust

fund, or from funds furnished for that purpose by the Donor.

In the event that the Trustee shall request from the Donor written instructions as to the action which it shall take in regard to any of the matters set forth in this paragraph, and the Donor shall neglect or refuse to furnish [fol. 174] such instructions for a period of ten (10) days, or in the event that the Donor shall be unable for any reason to furnish such instructions, the Trustee is hereby authorized and empowered to take such action in regard to such matters as it may deem proper and desirable.

The Donor hereby expressly reserves to himself the privilege of increasing the principal of the trust estate, at any time by adding thereto personal property and securities which the Trustee shall receive, hold, manage, sell, invest and reinvest in the same manner as hereinbefore specified in respect of the securities forming part of the original fund.

Fifth. The Trustee may in its sole discretion cause the securities which may from time to time comprise the trust fund, or any part thereof to be registered in its name as Trustee hereunder, or in its own name, or in the name of its nominee, or to take and keep the same unregistered, and to retain them or any part thereof, in such condition that they will pass by delivery.

Sixth. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust, a commission of one per cent (1%) per annum upon income, and is hereby authorized to deduct such commission before paying the income to the beneficiary hereunder.

The Trustee also shall be entitled to a commission of one per cent (1%) upon the market value of the trust fund when and as the trust shall terminate.

[fol. 175] The Trustee is also authorized, in the discharge of its duties, to employ counsel and agents and to determine and pay to them reasonable compensation, and it shall be entitled to reimbursement for the same, and for such other expenses and charges as it may deem necessary and proper to incur.

Seventh. The Donor covenants and agrees to make, execute and deliver in due form of law such other and further assignments, conveyances or other instruments as the Trus-

tee may deem requisite or necessary to effectuate the purposes hereof.

Eighth. The Trustee is further authorized and empowered to pay out of the income received from the trust fund any and all taxes which properly may become payable from time to time, under the laws of the United States, or of any state, county or municipality on said trust property or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

Ninth. In case of securities taken or purchased for said trust fund at a premium, the Trustee shall not be bound to set aside any part of the income thereof as a sinking fund to retire or absorb such premium.

Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of [fol. 176] the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned.

[fol. 177] Eleventh. The Trustee by joining in the execution of this instrument, signifies its acceptance of the trust.

Twelfth. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

This instrument is made in duplicate, each of which is an original, but both taken together shall be deemed one and the same instrument.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by a Vice-President, and its corporate seal to be hereunto affixed and attested by an Assistant Secretary as of the day and year first above written.

Wm. H. Porter. (Seal.) Signed, sealed and delivered in the presence of T. F. Mallaby. Bankers Trust Company, by H. F. Wilson, Jr., Vice-President. Attest: —— ——, Assistant Secretary.

[fol. 178] State of New York,
County of New York, ss:

On this 27th day of June, 1919, before me personally came William H. Porter, to me known and known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

Thos. W. Joyce, Notary Public, etc.

State of New York,
County of New York, ss:

On this 27th day of June, 1919, before me personally came H. F. Wilson, Jr., to me known, who, being by me duly sworn, did depose and say that he resides at Upper Montclair, N. J.; that he is a Vice-President of Bankers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Frederick W. Buston, Notary Public, etc.

[fol. 179] We hereby certify that the foregoing is a true copy of the original document.

Bankers Trust Company. P. E. Godridge.

Bankers Trust Company, New York. Supporting Schedule E. Jamie Porter Trust No. 2.

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RESPONDENT'S EXHIBIT C

MT-ET-C1-4896-CTK.
District of: First New York.
Estate of: William H. Porter.
Date of death: November 30, 1926.
Tentative deficiency: $178,291.47.

Sep. 29, 1928.

Richard L. Davisson et al., executors estate of William H Porter, 128 Broadway, New York, New York.

SIRS: The estate tax return filed for the above-named estate has been examined and a deficiency in respect of the tax has been tentatively determined.

If you acquiesce in the deficiency as determined, or in any part thereof, you may sign the enclosed waiver of the restrictions on the assessment of all or so much of the un-[fol. 180] discharged portion of the deficiency as results from adjustments in which you acquiesce and forward it to the Commissioner of Internal Revenue, Washington, D. C.

If you desire to protest against any portion of the deficiency such protest must be filed with the Commissioner of Internal Revenue within thirty days from the date of this letter. The procedure incident to the filing of a protest is governed by the Regulations relating to Estate Tax, copies of which may be obtained upon application to the Collector or to this office.

This determination is tentative only and no petition therefrom lies to the Board of Tax Appeals. If upon further consideration at the expiration of the thirty day period for filing protest it appears that a deficiency in respect of the tax exists final determination thereof will be made and you will be notified by registered mail in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926.

Examination of the return discloses the following:

| | |
|---|---|
| Correct amount of tax | $1,399,845.23 |
| Tax shown on the return | 1,221,553.76 |
| Deficiency | $178,291.47 |

There will be assessed and collected, as a part of the deficiency, interest thereon at the rate of six per centum per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a [fol. 181] waiver of the restrictions on the assessment, whichever is the earlier.

Against the tax shown on the return credit was claimed in the amount of $958,982.33. Proof has been submitted of the payment of State inheritance taxes in the aggregate amount of $226,855.16. No credit can be allowed on account of the payment of $66.07 to the State of Ohio as penalty for delinquency in paying the State inheritance taxes. To permit the filing of additional evidence, action with respect to the claim for credit will be held in abeyance for not to exceed thirty days from the date of this letter.

The return has been verified as filed except as to the following changes:

## Gross Estate

Stocks:

| Stocks and bonds | Returned | Tentatively determined |
|---|---|---|
| Item 11, including dividend | $28,800.00 | $28,725.00 |
| Item 12 | 150,500.00 | 150,750.00 |
| Item 27 | 0.00 | 3,000.00 |
| Item 29 | 104,250.00 | 103,968.75 |
| Item 33 | 15,600.00 | 15,650.00 |
| Item 34 | 2,660.00 | 2,695.00 |
| Item 35 | 191,250.00 | 189,375.00 |
| Item 47 | 4,700.00 | 4,975.00 |
| Item 58 | 46,337.50 | 46,200.00 |
| Item 59 | 36,750.00 | 37,250.00 |
| Item 77 | 4,800.00 | 4,787.50 |
| Item 79 | 19,500.00 | 20,163.00 |
| Item 87, including dividend | 205,500.00 | 205,000.00 |
| Item 90 | 10,750.00 | 10,725.00 |

[fol. 182] Other Miscellaneous Property:

| Stocks and bonds | Returned | Tentatively determined |
|---|---|---|
| Item 7 | 0.00 | 500.00 |
| Trustees' commissions, William H. Emory estate | 0.00 | 7,464.31 |
| Item 15 | 38,373.78 | 37,591.43 |
| Transfers: | | |
| Transfer in trust made November 27, 1926: | | |
| $100,000.00 corporate stock, City of New York 4½%, due 1965, Rapid Transit | 0.00 | 106,375.00 |
| Accrued income thereon | 0.00 | 2,250.00 |
| $50,000.00 City of New York, 4½% bonds, due 1967, Rapid Transit | 0.00 | 52,812.50 |
| Accrued income thereon | 0.00 | 937.50 |
| $50,000.00 City of New York, 4½% bonds, due 1967, Water Supply | 0.00 | 52,812.50 |
| Accrued income thereon | 0.00 | 937.50 |
| Transfer in trust made October 18, 1918: | | |
| $100,000.00 City of New York, 4½% bonds, due 1967, Rapid Transit | 0.00 | 105,625.00 |
| Accrued income thereon | 0.00 | 1,875.00 |
| Transfer in trust made February 1, 1919: | | |
| $100,000.00 City of New York, 4½% corporate stock, due 1965, Water Supply and Rapid Transit | | 106,375.00 |
| Accrued income thereon | 0.00 | 2,250.00 |

[fol. 183] Deductions

| | Tentatively determined | Returned |
|---|---|---|
| Funeral expenses | $130,198.74 | $160,992.74 |
| Executors' commissions | 499,137.14 | 748,705.71 |
| Miscellaneous administration expenses | 26,826.18 | 57,509.05 |
| Debts of decedent | 1,022,766.82 | 1,196,602.76 |
| To balance | 926,180.09 | |

The enjoyment of the property in the trusts to which reference is made under "Transfers" was, at the time of the grantor's death, subject to change through the exercise by the decedent of powers to alter or amend the trusts. In each of the trust instruments there is the provision: "This power to modify or alter is not intended and shall not be construed to include the right to the donor to make such modification or alteration in his favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned."

MT-ET-C1-4896-CTK—First New York.
Estate of: William H. Porter.
Date of death: November 30, 1926.

Summary

| | Returned (706) | Tentatively determined on review |
|---|---|---|
| Gross Estate: | | |
| Real estate | $35,500.00 | $35,500.00 |
| Stocks and bonds | 6,976,758.39 | 6,978,625.14 |
| Mortgages, notes, cash, and insurance | 19,915.55 | 19,915.55 |
| Jointly owned property | 0.00 | 0.00 |
| Other miscellaneous property | 4,764,682.40 | 4,771,864.36 |
| [fol. 184] Transfers | 0.00 | 432,250.00 |
| Powers of appointment | 0.00 | 0.00 |
| Property identified as previously taxed | 0.00 | 0.00 |
| Total gross estate | 11,796,856.34 | 12,238,155.05 |
| Deductions: | | |
| Funeral expenses | 160,992.74 | 130,198.74 |
| Administration expenses: | | |
| Executors' commissions | 748,705.71 | 499,137.14 |
| Attorneys' fees | 200,000.00 | 200,000.00 |
| Miscellaneous | 57,509.05 | 26,826.18 |
| Debts of decedent | 1,196,602.76 | 1,022,766.82 |
| Unpaid mortgages | 0.00 | 0.00 |
| Net losses during settlement | 0.00 | 0.00 |

| | Returned (706) | Tentatively determined on review |
|---|---|---|
| Support of dependents | 0.00 | 0.00 |
| Property identified as previously taxed | 0.00 | 0.00 |
| Charitable, public, and similar gifts and bequests | 27,500.00 | 27,500.00 |
| Specific exemption (resident decedents only) | 100,000.00 | 100,000.00 |
| Total deductions | 2,491,310.26 | 1,401,340.95 |
| Net estate for tax | 9,305,546.08 | 10,231,726.17 |
| Total tax | 1,221,553.76 | 1,399,845.23 |

Cag. (729M.) Treasury Department, Internal Revenue Bureau, Estate Tax Division. Form 7821A-Revised October, 1927.

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[fol. 185] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE—Filed Feb. 9, 1932

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit a transcript of the record in this proceeding comprising copies duly certified as correct of the following documents and records in the above-entitled proceeding, in connection with the petition for review by the said Circuit Court of Appeals heretofore filed by the petitioners in said proceeding, namely:

I. Docket entries of the proceedings before the Board of Tax Appeals.

[fol. 186] II. Pleadings before said Board:

(a) Petition, with

(1) Exhibit A, Sixty-days letter;
(2) Exhibit B, Trust indenture;
(3) Exhibit C, Trust indenture;
(4) Exhibit D, Purported revocation;

(5) Exhibit E, Purported revocation;
(6) Exhibit F, Trust indenture;

(b) Answer;
(c) Amendment to Petition;
(d) Amendment to Answer;
(e) Reply to Amendment to Answer;
(f) Answer to Amendment to Petition;

III. Findings of Fact and Opinion of the Board of Tax Appeals.

IV. Order of Redetermination.

V. Petition for Review and Assignments of Error, with notice of filing and proof of service.

VI. Statement of the evidence as settled or agreed upon, with the exhibits therein noted as received in evidence at the hearing, namely, Petitioner's Exhibits 1 to 6, both inclusive, and Respondent's Exhibits A, B and C.

[fol. 187] VII. This Præcipe.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Edward N. Perkins, Attorney for the Petitioners for Review by the Circuit Court of Appeals, Second Circuit. (Mailing Address: 15 Broad Street, New York, N. Y.)

I hereby, this February 9th, 1932, accept due personal service of a copy of the foregoing præcipe.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

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[fol. 188] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 189] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1931

No. 414

Argued May 17, 1932. Decided July 18, 1932

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. Davisson, as Surviving Executor, of the Estate of William H. Porter, Deceased, Petitioner, Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent, Appellee

Appeal from the United States Board of Tax Appeals

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Appeal by the petitioners from an order of the Board of Tax Appeals fixing a deficiency in their estate taxes for the year 1926.

Walter E. Hope, of New York City, for appellant.
Erwin N. Griswold, of Washington, D. C., for appellee.

OPINION

L. HAND, Circuit Judge:

Porter, the petitioners' testator, in 1918 and 1919, conveyed personal property to a trust company, under two deeds of trust, by which he created interests in specified beneficiaries, not necessary to set forth. Each deed reserved to him a sole power to revoke the appointments and substitute other beneficiaries, expressly excepting himself and his estate. He died in November, 1926, just before his death revoking the earlier deed and substituting another of the same kind. The chief question is whether the funds so conveyed are to be included as a part of his taxable estate under section 302 (d) of the Revenue Act of 1926, 26 U. S. C. A. §1094 (d). The pertinent language is as follows:

"The value of the gross estate * * * shall be determined by including the value * * * of all property * * * to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power * * * to alter, amend, or revoke."

The executors' argument is that as their testator had irrevocably parted with any interest in the property, the fact that he might change the beneficiaries at his pleasure is irrelevant; he had finally put it beyond his control; his reserved power to determine the eventual donees did not affect the definitiveness of his abandonment. There was therefore nothing on which to levy an excise; nothing certainly which could be treated as still a part of his estate.

The Commissioner answers that the power was in effect beneficial, despite its limitation. The donee might revoke the original limitation and select a facile beneficiary; might even make an agreement before hand that the substitute should unite with him to terminate the trust, as is possible in New York, when all the beneficiaries are in being. Personal Property Law (Consol. Laws N. Y. c. 41) § 23. In Meyer v. Bank of Manhattan Trust Co., 232 App. Div. 228, 249 N. Y. S. 640, the deed provided that it should not be revoked, but the settlor had a power to change the beneficiaries. He made his wife sole cestui que trust and with her consent successfully revoked the deed. In Faulkner v. Irving Trust Co., 231 App. Div. 87, 246 N. Y. S. 313, the settlor could not revoke until he was thirty-five years old, but by changing the beneficiary and getting the consent of [fol. 190] the substitute, he avoided the limitation. The Court of Appeals of that state has not, however, passed upon the point, and we are not entirely satisfied that the rights of existing beneficiaries can be circumvented by such a device. It may eventually be held that while the donee of the power is at liberty to revoke and reappoint at his pleasure, his choice must not violate the condition upon its exercise, either directly or indirectly. If so, the original interests are defeasible only when the settlor does not profit by the change, and equity will inquire whether this limitation has been observed, or whether the whole contrivance is in violation of the trust. As we think that this

part of the order should be affirmed anyway, we pass the point.

The language of section 302 (d) is broad enough to cover the case at bar. United States v. Field, 255 U. S. 257, 41 S. Ct. 256, 65 L. Ed. 617, 18 A. L. R. 1461, arose under the Act of 1916 (39 Stat. 756 as amended 39 Stat. 1000), which did not comprise general powers, and was decided for that reason. Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123, 124, 73 L. Ed. 410, 66 A. L. R. 397, involved the Act of 1921, where the relevant section (section 402 (c), 42 Stat. 278) read:

"To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust * * * intended to take effect in possession or enjoyment at or after his death."

The settlor has reserved a general beneficial power to revoke, whose termination by his death was treated as a taxable transfer. The theory was that, although the mere falling in of the remainders would not serve as such (a ruling repeated in May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244), the settlor had in substance imposed a condition upon the interests originally limited, which his death removed. His reservation of control left them contingent; only when that ended were they finally confirmed. The settlor's death was therefore an event upon which an excise might be levied; and, since the settlor might at any time resume the property as his own, the funds could be included in his estate. Part of this applies with equal force to subject the funds at bar to an excise, since for that result it is immaterial that the settlor cannot reappropriate the property. Though he has finally denuded himself, he controls the disposition while he lives; the existing limitations are conditional upon his pleasure. A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends. Thus the subject matter of the tax was within the reach of Congress as much as any other transfer by

death; the only question is whether the statute has exceeded any constitutional limitations.

However, while there was a proper subject of taxation, it does not follow that the tax actually imposed was valid. It was computed upon an amount that included the trust funds as part of the testator's estate, which by hypothesis they were not; he had parted with them. If the deeds had been made after February 26, 1926, when the act was passed, we can see no difficulty; Congress may measure an excise as it will, certainly so long as it does not upset arrangements made in reliance upon an existing immunity. Any one setting up such trusts with the law before him would be charged with notice that they would subject his estate to taxes calculated as prescribed. None of the reasons on which Nichols v. Coolidge, 274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081, depended, exist in such a case; nor does the law attempt to tax one person for the property of another, as in Hoeper v. Tax Commission, 284 U. S. 206, 52 S. Ct. 120, 76 L. Ed. —. But the deed in fact antedated the law, and if it had been impossible for the testator to escape, possibly difficulties would have arisen. It might perhaps be held that the excise must be computed with some relation to the property disposed of; that it could not be reckoned by a graduated sale upon an amount which included the settlor's estate as well. That question has never, so far as we can find, been bruited; we raise it now merely by way of narrowing the issue, without suggesting an answer. We should have had to answer it, if there had been a complementary gift tax in the Act of 1926—appropriately worded (Guggenheim v. Commissioner, 58 F. (2d) 188 (C. C. A. 2)—making the revocation of such a power a transfer. In that event the donee could not escape, either by revoking the power, or leaving it unexercised till his death. But there was no gift tax, and the testator by relinquishing the power could have freed his estate altogether; he had ample season for this, for he did not die until some [fol. 191] eight months after the statute was passed. This seems to us to avoid any possible constitutional difficulties. If the power be regarded as the testator's property in a beneficial sense—a hypothesis we reject—Reinecke v. Northern Trust Co. rules; if it be regarded as limited to a change of beneficiaries from which he could not indirectly profit, he might abandon it and avoid the tax. Surely

there is no such hardship in the alternative as would justify holding that the inclusion of the estate in the base for computation denied him "due process of law." Especially as to taxes, courts are unwilling, except in the plainest cases, to declare statutes invalid for that reason. Treat v. White, 181 U. S. 265, 21 S. Ct. 611, 45 L. Ed. 853; McCray v. U. S., 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; U. S. v. Doremus, 249 U. S. 86, 39 S. Ct. 214, 63 L. Ed. 493; Billings v. U. S., 232 U. S. 261, 282, 34 S. Ct. 421, 58 L. Ed. 596. The tax was therefore valid and the Board was right.

The other question raised is of deductions claimed by the executors for payments made to fulfill the testator's benefactions. He had promised to Princeton University to pay the cost of a memorial window to be built for his son, killed in the war. To a hospital in Glen Cove, Long Island, he promised to pay for the building of an X-ray room, as another memorial. Each institution in reliance upon the promise performed the condition, and the executors paid. The record contains no evidence as to the character of either, but we take judicial notice that Princeton University is "organized and operated exclusively for * * * educational purposes," within section 303 (a) (3) of the Act of 1926, 26 U. S. C. A. § 1095 (a) (3). We can know nothing about the hospital. There are private hospitals, "part of the net earnings of which inures to the benefit of any private stockholder or individual." This may not be one, but upon the bare record we cannot assume so, and the taxpayer has the burden of proof.

Against this result the executors invoke section 303 (a) (1), 26 U. S. C. A. § 1095 (a) (1), which allows a deduction of "claims against the estate * * * to the extent that such claims * * * were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth." That the testator's promise created a valid contract nobody denies; "promissory estoppel" is now a recognized species of consideration (Restatement of Contracts, § 90); indeed, the doctrine first gained currency in cases like those before us. But the section was certainly not intended to include all contracts supported by a consideration; so much is clear. We need not limit it to cases where the consideration passes to the testator; for example, a promise to pay for goods delivered to another might fall within it, if the testator has recourse over. But if he has

not, the transaction is in substance a gift and must stand or fall with section 303 (a) (3). So here, though the testator was bound by his promise, what in fact he did was to give to the hospital a memorial to his son; it was not a financial bargain at all, and subdivision 1 is concerned with such. Had he delivered to it a bond under seal in a state where the common law still persists, the claim would hardly have been incurred for "full consideration in money or money's worth"; though the purpose were to use the proceeds to add to its equipment. The statute cannot have meant to make critical the accident that the hospital, by acting upon the promise, fastened a debt upon the estate. So to construe the language is to confuse the purposes of the two subdivisions.

Order affirmed, except as to the contribution to Princeton University.

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[fol. 192] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the courtrooms, in the Post Office building, in the city of New York, on the 25th day of July, one thousand nine hundred and thirty-two.

ESTHER JACKSON PORTER, as Executrix, etc., et al.,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

JUDGMENT—Filed July 26, 1932

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed except as to the contribution to Princeton University.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 193] [File endorsement omitted.]

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[fol. 194] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 195] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 14, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Endorsed on cover: File No. 37,163. U. S. Circuit Court of Appeals, Second Circuit. Term No. 466. Esther Jackson Porter, as executrix, and Richard L. Davisson, as surviving executor, of the estate of William H. Porter, deceased, petitioners, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed October 24, 1932. File No. 37,163.

No. 466

OCT 24 19
CHARLES ELMORE

IN THE

# Supreme Court of the United States

**OCTOBER TERM—1932.**

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Estate of WILLIAM H. PORTER, Deceased,

*Petitioners,*

*against*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WALTER E. HOPE,
*Counsel for the Petitioners,*
15 Broad Street,
New York, N. Y.

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IN THE

# Supreme Court of the United States,

OCTOBER TERM—1932.

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Estate of WILLIAM H. PORTER, Deceased,
*Petitioners,*
*against*
COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Esther Jackson Porter, as Executrix, and Richard L. Davisson, as Surviving Executor, respectfully show:

### Statement.

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decision made and entered in said court on July 26, 1932, affirming (except as to a minor point) a determination of the United States Board of Tax Appeals in a proceeding wherein your petitioners were the

petitioners and the Commissioner of Internal Revenue was the respondent (Tr., fol. 12).

The purpose of said proceeding was to determine the petitioners' liability, to wit, the liability of the estate of the petitioners' testator, William H. Porter, under the Revenue Act of 1926 (44 Stat. 9) to Federal Estate Tax. It presented this question:

> In the valuation and assessment under the 1926 Revenue Act of a resident decedent's estate for Estate Tax purposes, should property be included in the gross estate for purposes of taxation under section 302 (d) which, several years previously and not in contemplation of death, the decedent had transferred to a trustee absolutely and completely, except for a power reserved for life to modify or alter the trust instrument in any manner provided that "this power to modify or alter is not in- "tended, and shall not be construed to include the "right of the Donor to make such modification or "alteration in his own favor or in favor of his "estate, but shall apply only so far as the inter- "ests of third persons may be concerned."

The Board of Tax Appeals answered this question affirmatively. The Circuit Court of Appeals affirmed the determination of the Board of Tax Appeals.

## Reasons for Review.

### I.

The decision in this case is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Brady* v. *Ham*, 45 Fed. (2nd Ser.) 454. Moreover the Court of Appeals of the District of Columbia in *Cover* v. *Burnet* (53 Fed. (2nd) 915) concurs on this question with *Brady* v. *Ham*. Accordingly direct conflict exists between the First Circuit and the Second Cir-

cuit on the one hand, and between the District of Columbia and the Second Circuit on the other.

## II.

The case involves a question of Congressional power under the Constitution which is perhaps of recent development. In this case, in the opinion, the Circuit Court of Appeals holds that "*Congress may measure an excise as it will*". The Supreme Court has squarely held that an attempt by Congress to tax a transfer at death by the measure of the value of the estate plus the value of property given away by the decedent absolutely within two years of death is void (*Heiner* v. *Donnan,* 285 U. S. 312). There is therefore *some* restraint on the power of Congress to measure an excise "as it will".

## III.

The decision in this case appears to be in conflict with the decision of the Supreme Court in *Reinecke* v. *Northern Trust Co.* (278 U. S. 339), thereby creating a confusion detrimental to precise or consistent application of this law of daily application. The act which was under consideration in *Reinecke* v. *Northern Trust Co.* provided that property conveyed away during life but subject to take effect in possession or enjoyment at or after death should be brought into the tax-measure (Cf. Revenue Act of 1926, sec. 302-d). In the *Reinecke* case the court held that the act did not extend to interests vested when created although possession and enjoyment of the transferred interest commenced at or after death, and stated as the reason, that no interests were intended to be reached other "than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death". In the present case the act provides that property transferred during life

subject to any change through the exercise of a power to alter, amend, or revoke should be brought into the tax-measure (sec. 302-d), and in view of the *Reinecke* case one infers that here too no interests were intended to be reached other "than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death".

It is respectfully submitted that this apparent inconsistency between the logic of the *Reinecke* case (and Cf. *May* v. *Heiner*, 281 U. S. 238) and that of the Circuit Court of Appeals in the present case, is confusing, and that a clearing up of that confusion would be of general benefit.

It is also respectfully submitted that in the respects set forth in the accompanying brief the decision in this case by the Circuit Court of Appeals appears also to be in conflict with the decision of this court in *Nichols* v. *Coolidge*, 274 U. S. 531.

WHEREFORE, your petitioners, referring to the accompanying brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit, to certify and send to this court a full and complete transcript of the record herein, to the end that the said case may be reviewed and determined by this court as provided by law, and that the decision of said Circuit Court of Appeals may be reversed, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just.

And your petitioners will ever pray.

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Estate of WILLIAM H. PORTER, Deceased.

By WALTER E. HOPE,
Attorney for Petitioners.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

WALTER E. HOPE, being duly sworn, says:

I am attorney for the petitioners in the matter of the foregoing application for a writ of certiorari. I have read said petition and know its contents, and the facts therein stated are true to the best of my knowledge, information, and belief.

WALTER E. HOPE.

Sworn to before me this
October 19, 1932.

PEARL E. LOEBER
Notary Public, Kings County
Kings Co. Clk's No. 641, Reg. No. 3342
N. Y. Co. Clk's No. 805, Reg. No. 3-L-516
Commission Expires March 30, 1933.

[SEAL]

## INDEX TO BRIEF.


| | PAGE |
|---|---|
| Statement | 1 |
| Facts | 2 |
| Argument | 5 |
| Conflict between Circuits | 5 |
| Conflict with Supreme Court Decisions | 6 |
| Statutory Provisions Concerned (Appendix) | i |


### TABLE OF CASES.


| | |
|---|---|
| *Brady* v. *Ham*, 45 Fed. (2nd) 454 | 5, 6, 7 |
| *Chase Nat. Bank* v. *U. S.*, 278 U. S. 327 | 7 |
| *Cover* v. *Burnet*, 53 Fed. (2nd) 915 | 5 |
| *May* v. *Heiner*, 281 U. S. 238 | 6 |
| *Nichols* v. *Coolidge*, 274 U. S. 531 | 6, 8 |
| *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 | 6, 7 |


*Note:* One additional case, *Heiner* v. *Donnan* (285 U. S. 312), is referred to in the foregoing petition, at page 3, *supra*.

### STATUTES.


| | |
|---|---|
| Revenue Act of 1921, sec. 402 (c) | 6 |
| Revenue Act of 1924, sec. 302 (c) | 6 |
| *Revenue Act of 1926, sec. 302 (c) | 6, 7 |
| *Revenue Act of 1926, sec. 302 (d) | 6, 7 |
| Revenue Act of 1919, sec. 402 (c) | 8 |


*Printed in Appendix, page i, *infra*.

In the

# Supreme Court of the United States,

OCTOBER TERM—1932.

Esther Jackson Porter, as Executrix, and Richard L. Davisson, as Surviving Executor, of the Estate of William H. Porter, Deceased,
Petitioners,
*against*
Commissioner of Internal Revenue,
Respondent.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

## I.

### Statement.

The petitioners are the executors of the Estate of William H. Porter, who died a citizen and resident of the United States and of New York. The respondent is the Commissioner of Internal Revenue.

This cause originated in an application of the petitioners to the United States Board of Tax Appeals to review the determination of said Commissioner respecting the Estate Tax liability of your petitioners as executors (Tr., fols. 11, 12). It was duly heard in Washington by said Board of Tax Appeals, before which Board the case was made as stated below and in the transcript of the record filed herewith (Tr., fols. 220-317). The decision of the Board was adverse to your petitioners

and your petitioners thereupon petitioned the United States Circuit Court of Appeals, Second Circuit, to review the decision of the Board of Tax Appeals (Tr., fols. 253-282; 325-368). The case duly came on to be heard before the Circuit Court of Appeals, which court on July 25, 1932, affirmed the determination of the Board of Tax Appeals in respect of said matter. The mandate on the affirmance was entered July 26, 1932.

## II.

## Facts.

The estate concerned is that of William H. Porter, who died November 30, 1926, resident in New York (fol. 225). The petitioners are his executors (fol. 227).

On October 18, 1918, the decedent transferred $100,000. in securities in trust to Bankers Trust Company for his daughter and her son (Petition, Exhibit B, fol. 67). This is designated "Trust No. 1" in the findings (fols. 227, 228). On the same day he transferred a like amount to the same trustee for his son and the son's daughter (Respondent's Exhibit A, fol. 466). This is designated "Jamie Porter Trust No. 1" in the findings (fol. 244). On February 1, 1919, he created a third trust with the same trustee comprising $100,000. in securities for his daughter and her son mentioned above (Petition, Exhibit C, fol. 102). This is designated "Trust No. 2" in the findings (fol. 229). On June 27, 1919, he created with the same trustee a fourth trust of like value, for his son's daughter (Respondent's Exhibit B, fol. 502). This is designated "Jamie Porter Trust No. 2" in the findings (fol. 245). The petition, with its exhibits, is in evidence (fols. 388, 389).

The findings set forth the substance of the beneficial provisions of the several instruments creating these trusts (fols. 228-231; fols. 240-242; fols. 244-246). All

four of them dispose of all interests in the property affected, and they are in their provisions ordinary trust conveyances. Each contains the following provision (fols. 231-234):

> "TENTH: Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successors said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born, or unborn, shall have any right, interest, or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned."

After these four trusts were created, the decedent's daughter had two more children (fol. 235). The decedent decided that he wished to include them with their elder brother in the benefits of Trusts Nos. 1 and 2 (fols. 235,

236). He undertook to do this by attempting to revoke Trusts Nos. 1 and 2, as if the reserved power enabled him to revoke. He delivered to the trustee two instruments, one for each trust (Nos. 1 and 2) as follows (fols. 236-240):

> "Pursuant to the power reserved by me in the Tenth Article of the above described Deed of Trust, I hereby revoke said Deed and terminate the interests of all persons therein, and I hereby direct you to deliver the principal thereof, all income on such principal accrued but not actually received, and all income thereon received but not yet distributed to the beneficiary, to yourselves as Trustee under a new Deed of Trust dated the same date as this letter and executed by me in favor of said Helen Porter Davisson and other beneficiaries, such principal to be held by you as principal of the new trust and such income, whether accrued or received, to be treated by you as you would have treated that income under the trust which I now revoke.
>
> Very truly yours,
> (Signed) Wm. H. Porter. (Seal)
>
> State of New York )
> County of New York ) ss.:
>
> On this 27th day of November, 1926, before me personally came William H. Porter, to me known to be the individual described in and who executed the foregoing Revocation and acknowledged to me that he executed the same.
>
> (Signed) James J. McDermott."

At the same time or immediately thereafter on the same day the decedent delivered a new trust deed to the same trustee purporting to grant all of the same property comprised by Trusts Nos. 1 and 2, and nothing else, upon trusts for his daughter and all of her children (fols. 240-242). This new instrument, called "Trust No. 3" in

the findings (fol. 242), was similar to its predecessors and contained *verbatim* the same reservation of power quoted above (fols. 240-242). Although there is no finding on the subject, the proof is that the trustee did not redeliver any part of the trust corpus to the decedent, but retained possession throughout (fols. 413-416) and would have refused to part with it if requested (fol. 414).

The decedent died November 30, 1926 (fol. 225).

None of these transfers was made in contemplation of death. This is expressly found as to the 1926 transaction (fol. 243) and as to Trusts Nos. 1 and 2 (fol. 234). There is no finding either way as to the Jamie Porter Trusts Nos. 1 and 2, but both were made more than seven years before death, and no attempt was ever made to alter or amend either of them.

## ARGUMENT.

### FIRST POINT.

**There is a direct conflict between Circuits.**

The facts in this case, stated above, and those presented in *Brady* v. *Ham*, decided by the Circuit Court of Appeals for the First Circuit and reported in 45 Fed. (2nd Ser.), 454, 455, are in every material respect identical and the controlling statutory provisions concerned are identical (Rev. Act of 1924, sec. 302-d and Rev. Act of 1926, sec. 302-d). The decisions are directly opposite. The provision of the declaration of trust which gave rise to the controversy in *Brady* v. *Ham*, *supra*, is stated by the court at page 455 as follows:

> " 'Said Elizabeth S. Haynes shall have full power to make any additions to the trust property and to change and alter any or all of the trusts herein set forth, to name any beneficiaries other than those above named *except herself*, whether by

way of addition of substitution, and to appoint another trustee or other trustees at any time either by way or addition or substitution for the trustee or trustees at any time acting.' "

*Cover* v. *Burnet*, 53 Fed. (2nd) 915, a case decided by the Court of Appeals of the District of Columbia is likewise in direct conflict with the decision of the Circuit Court of Appeals in this case since it involved substantially the same facts and the identical statutory provisions involved in the present case. The decision in *Cover* v. *Burnet* is in accord with that in *Brady* v. *Ham*.

## SECOND POINT.

**The decision in the present case is believed to be in conflict with applicable decisions of the Supreme Court.**

Reference is had to *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 and *May* v. *Heiner*, 281 U. S. 238, which follows *Reinecke* v. *Northern Trust Co.*, and to *Nichols* v. *Coolidge*, 274 U. S. 531.

*Reinecke* v. *Northern Trust Co.*, and *May* v. *Heiner*, arose under the 1921 Revenue Act, sec. 402 (c), a provision carried over into the 1924 and 1926 acts as 302 (c), where it is coördinate with, and in structure and general intent similar to, sec. 302 (d) of the 1926 act. Sections 302 (c) and 302 (d) parallel and complement each other. Each describes property transferred previously to death which is to be included in the gross estate at death for purposes of taxation. Section 302 (c) brings in property "to the extent of" interests previously transferred "intended to take effect in possession or enjoyment at or after his death". Section 302 (d) brings in property "to the extent of" interests previously transferred "where the enjoyment thereof was subject at the date "of his death to any change through the exercise of a

"power * * * to alter amend or revoke". In *Reinecke* v. *Northern Trust Co.* the Supreme Court said of sec. 302 (c):

> "* * *. In the light of the general purpose of the statute and the language of sec. 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402 (c) 'to take effect in possession or enjoyment at or after his death', include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under sec. 401. That doubt must be resolved in favor of the taxpayer * * *."

In the present case the Circuit Court of Appeals declined to follow this reasoning with respect to sec. 302 (d).

In *Brady* v. *Ham* the Circuit Court of Appeals, First Circuit, followed what it believed to be the *principle* laid down in the decisions of the Supreme Court, namely, that as the tax is on the transfer at death of estates, the tax is measured only by property in which the decedent retained an economic interest till death (Cf. *Chase National Bank* v. *United States*, 278 U. S. 327). If the court was right, in *Brady* v. *Ham*, in the belief that the case was in effect ruled by decisions in this court including *Reinecke* v. *Northern Trust Co.* and *Chase National Bank* v. *United States*, the decision in this case is in conflict with decisions of this court.

That the Circuit Court of Appeals for the First Circuit in *Brady* v. *Ham* believed it was governed by decisions of this court as set forth above is made plain by the following quotation from the opinion:

> "*The decedent, Elizabeth S. Haynes, by her declaration of trust expressly deprived herself of the enjoyment of all economic benefits in the trust estate. While she might control the final disposition of it so far as the beneficiaries were concerned,*

> *she could not restore to herself any beneficial enjoyment of it.* She reserved no power of revocation as in the first 'two trusts' in the Reinecke case [citing cases]. So far as any economic benefits of the trust estate were concerned, they passed to the trustee at the time of the execution of the declaration of trust. The enjoyment of them may not have been definitely settled on the beneficiaries until her death and the beneficiaries may have been subject to a succession tax, but the right of enjoyment of any economic benefits thereof irrevocably passed from the decedent in 1911. To hold that such property was subject to a transfer tax would amount to what the Supreme Court had termed in the above-cited cases as an arbitrary and capricious exercise of legislative power."

In regard to *Nichols* v. *Coolidge, supra,* the transfer of the property sought by the Commissioner to be brought into the computation of the gross estate took effect before the legislation under which the Commissioner claimed to act. The applicable act (Rev. Act of 1919, sec. 402-c) brought into the gross estate transfers *inter vivos* intended to take effect in possession or enjoyment at or after death. The Supreme Court held that this provision, as applied to the value of property transferred before its enactment, was unconstitutional, and said at pages 542 and 543 of the 274th U. S.:

> "* * *. And we must conclude that sec. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by the decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. Whether or how far the challenged provision is valid in respect of transfers made subsequently to the enactment, we need not now consider."

In the present case the transfers were made previously to any enactment including in the gross estate, for

Estate Tax purposes, property previously transferred subject to a change of enjoyment through the exercise of a retained power, and it is submitted that, under *Nichols* v. *Coolidge,* it should be held that the inclusion "is unconstitutional in so far as it requires that there "shall be included in the gross estate the value of prop-"erty transferred by the decedent prior to its passage "merely because the conveyance was" at the death subject to a wholly non-beneficial power to change the enjoyment.

* * * * * * *

It is submitted that the true construction and application of a taxing statute in everyday use is involved, that a clear conflict of decisions of Circuit Courts of Appeal in different circuits exists concerning that application, that the decision below is in conflict with applicable decisions of the Supreme Court that the question of Federal law presented is important, and that the decision of the Circuit Court of Appeals in this case should be reviewed by writ of certiorari and reversed.

Respectfully submitted,

WALTER E. HOPE,
*Counsel for the Petitioners,*
15 Broad Street,
New York, N. Y.

## APPENDIX.

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) * * * *

(b) * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust

or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

(e) • • • •

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

**No. 466.**

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Will of WILLIAM H. PORTER, Deceased,

*Petitioners,*

*against*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR THE PETITIONERS.

WALTER E. HOPE,
*Attorney for the Petitioners.*

RICHARD L. DAVISSON,
EDWARD N. PERKINS,
*Of Counsel.*

# INDEX.


| | PAGE |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Statute Involved | 2 |
| Statement | 3 |
| Specification of Error | 6 |
| Summary of Argument | 7 |

ARGUMENT AS TO CONSTRUCTION:

I. The tax is laid upon the transfer of the net estate of the decedent at death. It is not laid upon the extinguishment of a limited power ..... 10

II. The value of the property previously transferred should not be included in the estate transferred at death ..... 12

III. The wording of Section 302(d) is peculiarly susceptible of the construction applied to Section 302(c) in *Reinecke* v. *Northern Trust Company*. Such a construction avoids arbitrary and unreasonable results, which are the inevitable consequences of the contention of the Government ..... 21

ARGUMENT AS TO CONSTITUTIONALITY:

PAGE

IV. As applied to the transfers in this case, Section 302(d) would be confiscatory and unconstitutional, if construed as the Government contends ..... 28

IRREVOCABILITY OF THE TRUSTS:

V. Each of the original trusts was irrevocable as and when made. The attempt to revoke trusts 1 and 2 was therefore ineffectual for that purpose. The indenture of November 27, 1926 therefore accomplished no transfer. Section 302(c) of the Act has no application ..... 34

CONCLUSION ..... 35

CITATIONS.

Cases:

*Brady* v. *Ham*, 45 Fed. (2nd), 454 ..... 8, 23
*Bullen* v. *Wisconsin*, 240 U. S. 625 ..... 22
*Burnet* v. *Northern Trust Co.*, 283 U. S. 782.... 21
*Chase Nat'l Bank* v. *United States*, 278 U. S. 327.....7, 8, 11, 14, 16, 17, 21, 28
*Cover* v. *Burnet*, 53 Fed. (2nd) 915 ..... 8, 26
*Dickey* v. *Goldschmidt*, N. Y. 60 Misc. 258 ..... 34
*Garner* v. *Germania Life Insurance Co.*, 110 N. Y. 266 ..... 34
*Heiner* v. *Donnan*, 285 U. S. 312 ..... 7, 9, 11, 28, 29, 30, 31, 33
*Hoeper* v. *Tax Commission*, 284 U. S. 206..... 28

PAGE

*Knowlton* v. *Moore*, 178 U. S. 41 ..... 8, 29

*Levett* v. *Farnham*, 169 Mass. 1 ..... 34

*May* v. *Heiner*, 281 U. S. 238.....15, 17, 21, 29
*McPherson* v. *Rollins*, 107 N. Y. 316 ..... 34
*Milliken* v. *United States*, 283 U. S. 15..... 32

*Nearpass* v. *Newman*, 106 N. Y. 47 ..... 34
*Nichols* v. *Coolidge*, 274 U. S. 531 ..... 7, 8, 9, 11, 21, 29, 30, 32, 33

*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339..7, 8, 10, 12, 14, 15, 16, 17, 20, 21, 27, 29, 30, 32, 35
*Roberts* v. *Taylor*, 300 Fed. 257 ..... 34

*Tyler* v. *United States*, 281 U. S. 497....7, 11, 15, 17, 29

*Untermyer* v. *Anderson*, 276 U. S. 440 ..... 32

*White* v. *Erskine*, 47 Fed. (2nd) 1014 ..... 11, 25

Text Writers:

Bispham, Equity ..... 20
Sugden, Powers ..... 22

IN THE

# SUPREME COURT OF THE UNITED STATES,

## OCTOBER TERM, 1932.

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Will of WILLIAM H. PORTER, Deceased,
*Petitioners,*

*against*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

# BRIEF FOR THE PETITIONERS.

## Opinion Below.

The opinion in this cause of the Circuit Court of Appeals (R., 111) is reported in volume 60 Federal Reporter (Second Series), at page 673 *et seq.* The opinion of the Board of Tax Appeals is reported in 23 B. T. A. 1016.

## Jurisdiction.

The decree of the Circuit Court of Appeals for the Second Circuit was entered July 26, 1932 (R., 116). The petition for certiorari was filed October 24, 1932. Certiorari was granted November 14, 1932 (R., 117). The jurisdiction of this court is based upon section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## Statute Involved.

The statute of the United States concerned is section 302(d) of the Revenue Act of 1926, providing as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * *
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;
>
> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished

any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title."

This is a case contesting the validity of a tax imposed by the Commissioner of Internal Revenue under the Estate Tax Law, and, specifically, the provision thereof last above quoted.

## Statement.

The estate concerned is that of William H. Porter, who died November 30, 1926, resident in New York (R., 44). The petitioners are his executors (R., 44).

On October 18, 1918, the decedent transferred $100,000 in securities in trust to Bankers Trust Company for his daughter and her son (Petition, Exhibit B, R., 44). This is designated "Trust No. 1" in the findings (R., 44). On the same day he transferred a like amount to the same trustee for his son and the son's daughter (Respondent's Exhibit A, R., 91-97). This is designated "Jamie Porter Trust No. 1" in the findings (R., 47). On February 1, 1919, he created a third trust with the same trustee comprising $100,000 in securities for his daughter and her son mentioned above (R., 44-45). This is designated "Trust No. 2" in the findings (R., 45). On June 27, 1919, he created with the same trustee a fourth trust of like value, for

his son's daughter (Respondent's Exhibit B, R., 98-104). This is designated "Jamie Porter Trust No. 2" in the findings (R., 48). The petition, with its exhibits, is in evidence (R., 2-37).

The findings set forth the substance of the beneficial provisions of the several instruments creating these trusts (R., 44-49). All four of them dispose of all interests in the property affected, and they are in their provisions ordinary trust conveyances. Each contains the following provision (R., 45, 46):

> "TENTH: Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interests of third parties may be concerned."

After these four trusts were created, the decedent's daughter had two more children (R., 46). The decedent decided that he wished to include them with their elder brother in the benefits of Trusts Nos. 1 and 2 (R., 46). He undertook to do this by attempting to revoke Trusts Nos. 1 and 2, as if the reserved power enabled him to revoke. He delivered to the trustee two instruments, one for each trust (Nos. 1 and 2) as follows (R., 46):

> "Pursuant to the power reserved by me in the Tenth Article of the above described Deed of Trust, I hereby revoke said Deed and terminate the interests of all persons therein, and I hereby direct you to deliver the principal thereof, all income on such principal accrued but not actually received, and all income thereon received but not as yet distributed to the beneficiary, to yourselves as Trustee under a new Deed of Trust dated the same date as this letter and executed by me in favor of said Helen Porter Davisson and other beneficiaries, such principal to be held by you as principal of the new trust and such income, whether accrued or received, to be treated by you as you would have treated that income under the trust which I now revoke.
>
> Very truly yours,
>
> (Signed) Wm. H. Porter (seal)

"State of New York)
County of New York) ss.:

> "On this 27th day of November, 1926, before me personally came William H. Porter, to me known to be the individual described in and who executed the foregoing Revocation and acknowledged to me that he executed the same.
>
> (Signed) James J. McDermott."

At the same time or immediately thereafter on the same day the decedent delivered a new trust deed to the same trustee purporting to grant all of the same property comprised by Trusts Nos. 1 and 2, and nothing else, upon trusts for his daughter and all three of her children (R.,

46, 47). This new instrument, called "Trust No. 3" in the findings (R., 47), was similar to its predecessors and contained *verbatim* the same reservation of power quoted above (R., 47). Although there is no finding on the subject, the proof is that the trustee did not redeliver any part of the trust corpus to the decedent, but retained possession throughout (R., 81) and would have refused to part with it if requested (R., 81).

The decedent died November 30, 1926 (R., 44).

Obviously the power did not admit of revocation and therefore the last-mentioned purported transfer was at most a modification, as is urged under our Point V, at page 34, *infra.*

None of these transfers was made in contemplation of death. This is expressly found as to the 1926 transaction (R., 47) and as to Trusts Nos. 1 and 2 (R., 46). There is no finding either way as to the Jamie Porter Trusts Nos. 1 and 2, but both were made more than seven years before death, and no attempt was ever made to alter or amend either of them.

## Specification of Error.

The error intended to be urged is:

> That the court below erred in holding that section 302(d) of the Revenue Act of 1926 requires inclusion in the gross estate of the decedent of the value of the property included in the trusts mentioned in the ~~petition~~ before the United States Board of Tax Appeals (R., pages 2-10).

The errors assigned before the Circuit Court of Appeals are set out in the Record (pages 70-72).

## SUMMARY OF ARGUMENT.

### Argument as to Construction.

I. The tax is laid upon the transfer of the net estate of the decedent at death. It is not laid upon the extinguishment of a limited power. *Reinecke* v. *Northern Trust Co.* (278 U. S. 339); *Chase National Bank* v. *United States* (278 U. S. 327); *Tyler* v. *United States* (281 U. S. 497); *Nichols* v. *Coolidge* (274 U. S. 531); *Heiner* v. *Donnan* (285 U. S. 312).

II. Section 302(d) should not be construed as including the value of the property previously transferred in the net estate at death.

The decedent had divested himself of all title and interest in 1918 and 1919. He could not revoke the instruments or recover the property or regain the use or enjoyment of it. He reserved power to alter or modify the trusts but expressly provided against the exercise of this power for the benefit of himself or his estate. When the gifts were made the property ceased to be a part of his estate and could not be brought back into it.

Sections 302(c) and 302(d) perform the same function and serve as measuring rods of what is to be included in the net estate, which is taxed under Section 301. The construction applied to Section 302(c) in *Reinecke* v. *Northern Trust Co.* should be applied to Section 302(d) in this case. Under this construction, property to be included in the gross estate must be property passing from the possession, enjoyment or control of the decedent at his death. There must be a shifting of an economic interest from the dead to the living, or of control for his own benefit. There was no such shifting in this case. The decedent by the original transfers had divested himself of all title and interest. He could not recall or repossess the property or its enjoyment for himself or his estate. At his death, all the interests

remained precisely as they were before death, except for the fact that the interests of the beneficiaries could no longer be disturbed. That fact may have enhanced *their* value but is immaterial here because this is not a succession tax. *Knowlton* v. *Moore* (178 U. S. 41); *Nichols* v. *Coolidge; Chase National Bank* v. *United States; Reinecke* v. *Northern Trust Co.*

III. The wording of Section 302(d) is peculiarly susceptible of the construction applied to Section 302(c) in the *Reinecke* case. Such a construction avoids arbitrary and unreasonable results, which are the inevitable consequence of the contention of the Government.

The words "any change" should be given a reasonable meaning. If they be held to mean "any change however slight", large amounts of tax would be made to depend upon some trivial or inconsequential change. If, however, they mean "any change without limitation", then the provision contemplates any change which the donor chooses to make, including one for his own benefit. The latter meaning would imply a control for himself of economic benefit (*Reinecke* v. *Northern Trust Co.; Chase National Bank* v. *United States*). That this is the meaning intended by Congress is evidenced by the Report of the Ways and Means Committee, which cited Section 302(d) as being in accord with the provision of the Income Tax Law relating to *revocable* trusts. It is further borne out by the association of the words "alter" and "amend" with the word "revoke" ("power to alter, amend or *revoke*"). The reasonable and logical construction therefore is that Section 302(d) refers to a power sufficiently unlimited that the donor might have taken advantage of it for his own benefit.

Until the decision in this case, this was the construction uniformly adopted by the Appellate Courts. (*Brady* v. *Ham*, 45 Fed. [2nd] 454; *Erskine* v. *White*, 47 Fed. [2nd] 1014; *Cover* v. *Burnet*, 53 Fed. [2nd] 915). The contrary construction would make the tax depend on trivial considerations and lead to arbitrary and unreasonable results.

## ARGUMENT AS TO CONSTITUTIONALITY.

IV. As applied to the transfers in this case, Section 302(d) would be confiscatory and unconstitutional, if construed as the Government contends.

Taxation of one person's property by reference to the property of another is unconstitutional. *Hoeper* v. *Tax Commissioner* (284 U. S. 206); *Heiner* v. *Donnan* (285 U. S. 312). Measuring the estate of a decedent for purposes of taxation by the value of property of which he had wholly divested himself, is taxation of one by reference to the property of another. The power does not make the property the decedent's. As stated by the Court below, the decedent had "finally denuded himself" of the property and could not recall or repossess it. The value of the trust property had no relation to the value of the estate at death. The power reserved had no realizable money value in any way commensurate with the value of the property. Even if the Statute could be construed as a tax upon the extinguishment of the power, it would be unconstitutional because it presents the arbitrary and capricious features condemned in *Heiner* v. *Donnan*. At his death the relation of the decedent to the property was no different from what it would have been if he had never owned the property, and had received the power as donee. All attempts to relate the trust property to the estate, therefore, must be predicated on *past* ownership and the real aim of the Government is to tax *past* gifts *inter vivos*. (*Nichols* v. *Coolidge; Heiner* v. *Donnan*). The inequitable character of the tax is particularly illustrated in this case where the trusts were executed long before the enactment of the Statute. The decedent here not only could not have foreseen the tax burden but he had no power of revocation or repossession by which he could have restored himself to his original position and made provision for the tax subsequently laid upon his estate.

V. Each of the original trusts was irrevocable as and when made. The attempt to revoke Trusts 1 and 2 was therefore ineffectual for that purpose. The indenture of November 27, 1926 therefore accomplished no transfer. Section 302(c) of the Act has no application.

## ARGUMENT AS TO CONSTRUCTION.

**Section 302(d) of the Revenue Act of 1926 should not be construed as including the property in question.**

### I.

**The tax is laid upon the transfer of the net estate of the decedent at death. It is not laid upon the extinguishment of a limited power.**

The tax is imposed by Section 301 of the Act which provides as follows:

> "* * * a tax equal to the sum of the following percentages of the value of the net estate * * * is hereby imposed upon the transfer of the net estate of every decedent * * *."

Only one thing is taxed, *the transfer of the net estate.* It is not a succession tax upon the interests to which the beneficiaries succeed.

Sections 302 and 303 merely furnish the measure of what constitutes the net estate, i. e. the transfer which is taxed. Section 302 defines what is to be included in the gross estate. Section 303 defines what deductions may be made from the gross estate.

Section 301 imposes the tax and the only thing taxed is the transfer of the net estate at death.

That the only thing taxed is a transfer of the net estate at death and that consequently there is to be excluded from the net estate property in which the decedent held no interest or power of enjoyment at death has been repeatedly held by this Court. *Reinecke* v. *Northern Trust Co.* (278

U. S. 339) Cf. *Chase National Bank* v. *United States* (278 U. S. 327); *Tyler* v. *United States* (281 U. S. 497); *Nichols* v. *Coolidge* (274 U. S. 531); *Heiner* v. *Donnan* (285 U. S. 312). This is made clear in the *Reinecke* case (*supra*) at page 348, where the Court said:

> "In the light of the general purpose of the statute and the language of §401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in §402 (c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under §401. That doubt must be resolved in favor of the taxpayer."

The provision there under construction was section 302(c) but the holding, that the tax is on the transfer of the net estate, applies equally to section 302(d), because both stand in precisely the same relation to section 301, and the functions of both are identical.

Because the tax is on the transfer of the net estate only, it is necessary, in order to sustain it, to hold that the effect of section 302(d) is to require the addition to the net estate, which is the only thing taxed, of property transferred many years before death and before the enactment of the statute, under the conditions appearing in this case. The tax cannot be merely upon the extinguishment of a limited power, as was suggested by the Court below. As was pointed out in *White* v. *Erskine* (47 Fed. [2d] 1014), the purpose of Congress in enacting Section 302(d) was not to create a new excise tax upon the extinguishment of a power. The function of Section 302(d) is to serve as one of several measuring rods to determine what shall be included in the net estate at death for purposes of taxation. This is the conclusion necessarily reached from a consideration of the scope and purpose of the Act, confirmed by the decisions in the *Reinecke* and other cases.

## II.

**The value of the property previously transferred should not be included in the net estate transferred at death.**

The decedent, Mr. Porter, transferred the property in trust in 1918 and 1919. At that time he divested himself of all title and interest. He could not revoke the instruments, or recover the property or regain the use or enjoyment of it. He reserved power to alter or modify the trust, but expressly provided against the exercise of this power for the benefit of himself or his estate. As to the decedent, the transfers were complete and irrevocable. When the gifts were made, the property ceased to be a part of his estate and could not be brought back into it. It is submitted that there could be no transfer of the property here involved or of any economic interest in it from the decedent at his death.

This is the effect of the holding in *Reinecke* v. *Northern Trust Co.* (*supra*). Two of the seven trusts there under consideration were subject to a power of revocation as long as the transferrer lived. The other five trusts were subject to extensive powers of management and to a power to alter, change or modify but only with the consent of one or more of the beneficiaries. The two trusts were held subject to tax because by the power of revocation, the transferrer had retained, until his death, the right to take back the property, thus making the transfers incomplete, so that the shifting of his interest was completed only at his death. The contrary result was reached as to the five trusts on the express ground that the transfers were complete when made, notwithstanding the reserved powers, so that no interest of the decedent shifted at death and, consequently, there was nothing to be included in the net estate at death, subject to this tax.

In discussing the purpose of the Statute, the Court said (p. 347):

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. (Citing cases). It is not a gift tax * * *. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death."

The Court further indicated the test applicable to these cases (p. 346):

> "*The shifting of the economic interest in the trust property which was the subject of the tax* was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax." (Italics ours.)

The Court pointed out that Section 401 of the Revenue Act of 1921 (which was under consideration in that case and which is the same as Section 301 in this case) attempts to tax only the "net estate of decedents", and that the property required by Section 402 to be brought into the gross estate was either property transferred in contemplation of death or "property passing out of the control, possession or enjoyment of the decedent at his death." The Court then said that in the light of the general purpose of the Statute and the language of Section 401 "explicitly imposing the tax on net estates of decedents" it was at least doubtful whether the trust in that case was intended to be included within the language "to take effect in posses-

sion or enjoyment at or after his death" and that the doubt must be resolved in favor of the taxpayer. It also registered its doubt as to the constitutionality of the Statute if construed as contended for by the Government. The Court emphasizes the "shifting of the economic interest" at death; and cites as a decisive factor the decedent's "power to recall the property and of control over it *for his own benefit.*"

The fact that the decedent retained certain powers over the trust property was not sufficient in itself to sustain the tax; in order to include it in his net estate at death for purposes of a *transfer* tax, it must appear that he had some *economic interest* in the trust property or *some power to recall the property for his own benefit.* The same reasoning is found in *Chase National Bank* v. *United States,* 278 U. S. 327, decided on the same day as the *Reinecke* case and emphasis is there laid upon "the completion of a shifting of the *economic benefits* of the property *which is the real subject of the tax.*"

The holding of the *Reinecke* case, in construing Section 302(c) is equally applicable here in the construction of Section 302(d). Sections 302(c) and 302(d) are coordinate in character and bear the same relation to Section 301, which imposes the tax.

Section 302(c) brings into the net estate transfers of property before death "intended to take effect in possession or enjoyment at or after death." Taken literally, this might seem to include a case where a remainder interest was created to vest in possession at or after the donor's death. This was the situation in the *Reinecke* case, where the Court stated the question in these words (p. 347):

> "But the question much pressed upon us remains, whether, the donor having parted both with the possession *and his entire beneficial interest* in the property when the trust was created, the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed, and after the enactment

of the statute, is included within its taxing provisions." (Italics ours.)

A similar question is here presented with respect to Section 302(d). Here the donor had likewise parted with the possession and his entire beneficial interest and the question is whether the termination at his death of a power to alter or modify which he could not use for his own benefit is included within the taxing provisions of the Statute.

In the *Reinecke* case the Court answered the question in the negative. It held that the expression in Section 302(c) "to take effect in possession or enjoyment at or after his death" includes no other interests than those "passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Section 401." Similarly here, by a parity of reasoning, the expression in Section 302(d) "subject at the date of death to any change through the exercise of a power to alter, amend or revoke" should be held to include no other interests than those passing from the possession, enjoyment or control of the donor at his death.

The conclusions reached in the *Reinecke* case and the reasoning supporting it apply in the present case with equal force, because, as the Court below has expressed it in this case (Opinion, R., 113), the decedent had "finally denuded himself" of the property. There was nothing to pass from him. The power which he had reserved was a naked and limited power which permitted no interest in or enjoyment of the property by himself. There was no possibility of repossessing or recalling the property or its enjoyment. The power did not pass when he died, but was "obliterated." (*May* v. *Heiner*, 281 U. S. 238.) There was nothing whatever of right or enjoyment which could pass or be transferred when the decedent died.

*Tyler* v. *United States* (281 U. S., 497) illustrates the point by contrast. There the new accession to the interest of the surviving tenant by the entirety which the death caused, was the counterpart of the interest of the deceased

tenant which he possessed during his life and which terminated with his death, so that what death deprived the one of, it gave to the other, resulting, as a practical matter, in an interest and enjoyment passing from the dead to the living.

It has been pointed out that the *Reinecke* case confines the application of Sec. 302(c) to interests passing from the possession, enjoyment or *control* of the decedent. But it is submitted that the *control* so contemplated was one linking the enjoyment or use of the property to the decedent beneficially, as in the cases of the two trusts held taxable in the *Reinecke* case because subject to a power of revocation, or in the case of *Chase National Bank* v. *United States*, decided at the same time. The ground for this understanding of the *Reinecke* case is, that, in view of the Court's reasoning, the *control* must be one which could relate the trust property to the thing taxed, the decedent's net estate. The Court's argument turns on the fact that the net estate is the only thing taxed, and that it is manifestly incongruous to construe a clause defining the contents of the net estate as intended to include anything not an element of value to the estate at the time of death. Two trusts presented in the *Reinecke* case were taxed. The decedent had neither any enjoyment nor any possession. But he had a power *to revoke*, revesting the property in himself. The two trusts were taxed because of this *control*. In the *Chase National Bank* case, decided the same day, insurance money payable to beneficiaries was held taxable. It was pointed out that, while the decedent, at his death, had neither possession nor enjoyment, he had *control*. He could surrender for cash. He could borrow upon the policies or collect their cash surrender value. His creditors could reach the fund. The Court rested its decisions in these cases on *control*, but a control *beneficial to the decedent*. That, it is submitted, is the character of *control* to which the Court referred in construing Sec. 302(c) as limited to interests passing from the possession, enjoyment, or control of the decedent at his death. In the present case, the

decedent had no such control, and he had no possession and no enjoyment, nor any power to acquire either. Hence, to hold the interests concerned taxable would accomplish precisely the incongruous result repudiated in the *Reinecke* case, of holding that a tax on the net estate passing at death could reach property not in the net estate and having no bearing on its value because out of the decedent's possession, not capable of being enjoyed by him, and excluded from all control by him for his own use or benefit.

The situation may be illustrated by an examination of what happened at death. Before death, the power to change beneficiaries was in the decedent, personal to him. The legal title was wholly vested in others than the decedent and the present and future enjoyment was wholly settled on others than the decedent. The power not only did not permit but plainly prohibited any recall. What effect, then, as respects the property, did death have in these circumstances?

The legal title remained vested precisely as before death. The present and future enjoyment remained settled precisely as before death. No control for the decedent's use was removed as in *Chase National Bank* v. *United States* and in *Reinecke* v. *United States* as to the two trusts. No enjoyment or ownership like that in *Tyler* v. *United States* or even like that in *May* v. *Heiner* passed or ceased. All the interests remained precisely as they were before death except for the fact that they could no longer be disturbed. That fact may have enhanced *their* value but this is not a succession tax.

It may well be contended that Congress has the right to levy an appropriate tax upon this type of transaction. But if Congress desires to levy such a tax, it should impose some form of succession tax upon the beneficiaries who receive the property rather than upon an estate, of which it has long since ceased to be a part; or it should impose a gift tax upon the donor at the time the transfer is made.

As a matter of fact, this is apparently what Congress has done in the Revenue Act of 1932. Section 501 of that

**Act makes provision for the Gift Tax and then provides as follows:**

> "(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible * * *.
>
> "(c) The tax shall not apply to a transfer of property in trust where the power to *revest in the donor title to such property* is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to said power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift." (Italics ours.)

In brief, the only exception is that of a trust in which the *donor has reserved a power to revest the property in himself.* The Statute, therefore, proceeds upon the theory that a trust in which the donor has no power to revest the property in himself represents a *completed transfer,* as far as the donor is concerned, and is therefore subject to the Gift Tax at the time the transfer is made.

The Government has apparently been not unmindful of the difficulties of an attempt to include in the net estate of the decedent for tax purposes property transferred many years previously and before the enactment of the Statute. It has accordingly labored to spell out a value for the power reserved and its efforts have been rendered more difficult by the necessity of establishing a value commensurate with the value of the property, not at the date of transfer but at the date of decedent's death. It must be obvious that this cannot be so. The power by its express terms excluded the decedent from any interest in or enjoyment of the property. A power to add a beneficiary, or make some other alteration without any right to recover the property, certainly cannot

be considered commensurate in value with a power to revoke or to repossess the property. The very statement of the proposition seems to answer itself.

Let us suppose that in place of Section 302(d) Congress had expressly imposed a tax upon the extinguishment at death of a power of a decedent to substitute one beneficiary (other than himself) for another, and had measured the tax by adding the trust property to that of the estate and directed the payment of the tax out of the estate. Irrespective of considerations of constitutionality, its incongruity is apparent. The irrelevancy of the value of the trust property worth perhaps $10,000,000 as the measure of a tax imposed upon the cessation of a power to say that A instead of B shall enjoy the trust, is manifest when it is considered that the result is a tax of, say, $1,000,000 to be paid, not out of the trust property but out of the estate of the holder of the power. The value of the property subject to the power has no relation to the value of the estate of the holder at his death. Nor in this case, in view of the fact that the decedent has expressly excluded himself from any benefit to himself or his estate, can value be attached to the power which is in any sense the equivalent of the value of the property at the date of death.

Realizing the necessity of establishing a close relationship between the trust property and the decedent's estate, the Government has put forward the extraordinary suggestion that, in spite of the fact that the trust instrument expressly provided that the transferrer could not exercise his power to name himself or his estate as beneficiary, nevertheless he might, in the words of the Court below, "revoke the original limitation and select a facile beneficiary, might even make an agreement beforehand that the substitute should unite with him to terminate the trust, as is possible in New York, when all the beneficiaries are in being."

It is to say the least doubtful, as indeed was questioned by the Court below, whether any such fraud upon the power would be permitted, or whether the transferrer would be allowed to exercise the power for his own benefit and to

the injury of the beneficiaries, in violation of his own agreement. The rule is thus stated in Bispham's Principles of Equity, 9th Ed., Sec. 256:

> "If a power is not exercised in good faith, and for the purposes for which it was created, its exercise will be deemed fraudulent in equity, and will be set aside upon a bill filed by a party in interest. A case in which a power is thus improperly exercised is said to be a case of 'a fraud upon the power'. The plainest case of a fraud on a power is where the power is exercised for the personal advantage of the appointor."

Furthermore, even if this extraordinary procedure were possible under the laws of New York, it would hardly constitute justification for construing Section 302(d) in the manner suggested, or as applicable to other jurisdictions. It should be noted that the New York Appellate Division decisions supposed to support this procedure (Opinion, R. 112) are cases where there was no limitation on the power to change beneficiaries so that beneficial appointment to the settlor himself would not have violated the rights of existing beneficiaries.

We submit that Section 302(d) should not be construed to include in the net estate at death the value of the property previously transferred in trust because the statute includes no other interests than those passing from the possession, enjoyment or control of the decedent at his death and so taxable as transfers on death under Section 301; *Reinecke* v. *Northern Trust Co.* (*supra*); that there was no transfer or shifting of interest from the decedent at death, nor did any power cease under which the decedent prior to his death might have secured for himself any economic benefit in the property; that the construction of Section 302(c) in the *Reinecke* case is equally applicable to Section 302(d) in this case. That construction, unlike the position taken by the Court below, is consistent with the repeated statements of this Court with respect to the various provisions of Section 302, that *the passing of an economic*

*interest from the decedent is the real subject of the tax* (cf. *Nichols* v. *Coolidge*, 274 U. S. 531 at p. 541; *Chase National Bank* v. *United States*, 278 U. S., 327 at p. 338; *Reinecke* v. *Northern Trust Co.*, 278 U. S., 339 at p. 346).

We know of no case in which previous transfers have been held taxable, in which the decedent did not hold until death some economic interest in the property or some power to recall or control for his benefit an economic interest. On the other hand, in *May* v. *Heiner* (281 U. S. 238) and *Burnet* v. *Northern Trust Co.* (283 U. S. 782) where the decedent retained the use of the property for life, the property was held to be not subject to tax.

## III.

**The wording of Section 302(d) is peculiarly susceptible of the construction applied to Section 302(c) in Reinecke vs. Northern Trust Company. Such a construction avoids arbitrary and unreasonable results, which are the inevitable consequence of the contention of the Government.**

Section 302(d) provides:

> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at * * * his death to *any change* through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke," etc. (Italics ours.)

What is intended by the words "any change"? Do they mean (1) any change whatever, however slight or limited in character, or (2) any change, without limitation, which the donor chooses to make? Surely if the purpose of the Statute is to bring into the decedent's net estate for taxation at death the value of property transferred years

before, it cannot be made to depend upon the power to make some trivial or inconsequential change. Thus in the present case, if the sole power reserved had been to provide for the accumulation of income of infant beneficiaries or that the life tenant should receive the principal at the age of 35 instead of 30, a contention that tremendous amounts of tax should be based upon such trivial considerations would be open to a charge of capriciousness.

If, on the other hand, "any change" means "any change without limitation", then the provision contemplates a case where the donor can make any change he chooses, including one for his own benefit or that of his estate. In that case he holds a potential *interest* which passes at his death and a control of the enjoyment for his benefit which ceases at his death. For an unlimited power is an interest, since it is a general power to dispose and the equivalent of a fee (*Bullen* v. *Wisconsin*, 240 U. S. 625; Sugden, Powers, 8th Ed. p. 396).

That the latter interpretation is the one intended is evidenced by the Report of the Ways and Means Committee of the House (68th Congress) recommending enactment of the original Section 302(d) in the 1924 Revenue Act (Report 179, p. 65) as follows:

> "This provision is in accord with the principle of Section 219 (g) of the Bill which taxes to the Grantor the income of a *revocable* trust."

The Section 219 (g) referred to reads:

> "Where the grantor has the power to revest in himself title to any part of the trust then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

It is significant in this connection to note that the wording of Section 302 (d) is

> "subject at * * * his death to any change through the exercise of a power, * * * to alter, amend or *revoke* etc."

If "alter" or "amend" relate to any trifling change, their intimate coupling with "revoke" would be inappropriate. The principle of *noscitur a sociis* is applicable. The association of these words with the word "revoke", taken in conjunction with the Report of the Committee accompanying the proposed bill, quoted above, clearly indicates the character of the alteration or amendment which Congress had in mind, i. e., the equivalent of revocation.

The reasonable and logical construction to be placed upon Section 302 (d) is, therefore, that it refers to a power, sufficiently unlimited that the donor might have taken advantage of it for his own benefit, for the following reasons:

1. It harmonizes the provision with the scope and purpose of the Act, to tax the transfer of the net estate, avoiding the incongruity pointed out in the *Reinecke* case of bringing into the measure of a tax on a particular transfer the value of property not affected by the transfer (278 U. S., at p. 348).
2. It gives proper significance to the phrase "to alter, amend or *revoke*".
3. It avoids arbitrary and unreasonable results in practice.

Until the decision in this case, the various Appellate Courts had uniformly construed Section 302(d) in the manner for which we contend. Thus the case of *Brady* v. *Ham* (45 Fed. [2d] 454) was in all respects similar to the case now under consideration. The power reserved in that case was as follows:

> "Said Elizabeth S. Haynes shall have full power to make any additions to the trust property and to change and alter any or all of the trusts herein set forth, to name any beneficiaries other than those above named *except herself*, whether by way of addition or substitution * * * ."

The Circuit Court of Appeals for the First Circuit, after reviewing the various Supreme Court decisions, said:

> "The test, therefore, is whether the donor or decedent has reserved to himself control over the

economic benefits or enjoyment of the trust property. If the *economic benefits* passed under the trust deed from the decedent's control beyond recall, there can be no transfer tax.

"As the Court said in *May* v. *Heiner*, 281 U. S. 238, 50. S. Ct. 286, 287, 74 L. Ed. 826, 62 A. L. R. 1244, 'At the death (of the decedent) no interest in the property held under the trust deed passed from her to the living.' So in the case of the decedent in the instant case, the title thereto had been definitely fixed by the trust deed. She could not take it back either directly or indirectly.

"*The decedent, Elizabeth S. Haynes, by her declaration of trust expressly deprived herself of the enjoyment of all economic benefits in the trust estate. While she might control the final disposition of it so far as the beneficiaries were concerned, she could not restore to herself any beneficial enjoyment of it.* She reserved no power of revocation as in the first 'two trusts' in the *Reinecke* case. *Bath Sav. Institution* v. *Hathorn*, 88 Me. 122, 33 A. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382; *Keyes* v. *Carleton*, 141 Mass. 45, 49, 6 N. E. 524, 55 Am. Rep. 446; *Thurston, Petitioner*, 154 Mass. 596; 29 N. E. 53, 26 Am. St. Rep. 278; *Sands* v. *Old Colony Trust Co.*, 195 Mass. 575, 577, 81 N. E. 300, 12 Ann. Cas. 837. So far as any economic benefits of the trust estate were concerned, they passed to the trustees at the time of the execution of the declaration of trust. The enjoyment of them may not have been definitely settled on the beneficiaries until her death, and the beneficiaries may have been subject to a succession tax, but the right of enjoyment of any economic benefits thereof irrevocably passed from the decedent in 1911. To hold that such property was subject to a transfer tax would amount to what the Supreme Court had termed in the above-cited cases as an arbitrary and capricious exercise of legislative power.

"This test established by the Supreme Court has been since followed in the Circuit Court of Appeals in the Third Circuit in *McCaughn* v. *Carnill*, 43 Fed. (2d) 69, and in the District Court for the District of Massachusetts in *Erskine* v. *White*, 43 Fed. (2d) 765, decided October 1, 1930."

The case of *White* v. *Erskine* subsequently came before the Circuit Court of Appeals, which thereupon examined the question anew. (47 Fed. [2d] 1014.) After referring to the various sub-sections of Section 302, the Court said (p. 1016):

> "In (a) it is expressly limited to the extent of the interest therein of the decedent at the time of his death. This limitation in view of the nature of the tax, viz., a tax on the right to transfer property at death, must, in view of the opening words of each subdivision, be applied throughout the section. In other words, if there is no property or beneficial interest in property passing from the decedent at death, there can be no tax under this act.
>
> * * * * * *
>
> "The government now contends in effect that by subdivision (d) Congress has undertaken to impose a new form of excise tax, viz., a tax on the power to alter or revoke before death a trust created by the grantor, whether the power be of a general or limited nature. We do not think Congress intended by the addition of subdivision (d) to add a new form of tax. It was only 'to the extent of the interest' of the decedent in the trust fund, and at his death, that subdivision (d) adds anything to the value of the gross estate. If the decedent had no beneficial interest in the trust fund at his death, under the construction of the Supreme Court in the above-cited cases, there was nothing transferred from him at death within the meaning of section 301, which imposes the tax.
>
> "The report of the Committee to the House of Representatives, 68th Congress, Rep. 770, p. 65, subdivision (d), clearly indicated the intent of Congress, and is in harmony with section 301 and the other subdivisions of section 302.
>
> "The committee's report was as follows: 'This provision is in accord with the principle of Sec. 219(g) of the bill which taxes to the grantor the income of *revocable trusts.*' (Italics supplied.)
>
> "In other words, where a grantor, either alone or in conjunction with anyone not a beneficiary under the trust, has retained 'the power to revest in himself title to any part of the trust', to quote from

> section 219(g), then the body of the trust at the death of the decedent may be included in the value of the gross estate; but where the decedent has no such power except by the consent of an adverse party as one of the beneficiaries, or as in this instance of the trustee for the beneficiaries, the right of revocation is gone from the donor and also all beneficial interest for taxing purposes under section 301 of the act.
>
> "To hold that Congress under subdivision (d) intended under the guise of a tax on the transfer of property at death to impose a tax solely on a limited power of alteration of a trust, or a limited power of appointment under it, would be contrary, not only to the spirit of the act, but the express terms of section 301, Lesser, Executrix, *v.* Burnet, Com., supra; Fidelity-Phila. Trust Co. *v.* McCaughn (C. C. A.) 34 F. (2d) 600, 604, and so doubtful a construction that the contrary intent should be resolved in favor of the taxpayer, Gould *v.* Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211."

To the same effect is the case of *Cover* v. *Burnet* (53 Fed. [2nd] 915) decided by the Court of Appeals of the District of Columbia.

It is both logical and reasonable in determining the test of liability for the Federal Estate Tax, to hold that "any change through the exercise of a power" should be interpreted to mean any change broad enough to permit the maker or his estate to benefit in the property. This makes possible an interest or its equivalent in the donor. In that event the addition of the property to his estate for purposes of taxation is directly in line with the purposes of the Act.

If, however, the wording is to be interpreted to mean "any change whatever", however slight, burdensome taxation may be made to depend upon the merest trifles, and there is at once created the possibility of arbitrary and unjust exactions.

Thus, the reservation of a power to direct accumulation of income or to postpone the payment of principal might render a transfer taxable. A donor might make a trust for his children which would be free of tax but if he reserved the right to make provision for an after-born child, the property would be rendered taxable, even though he expressly excluded himself and his estate from any benefit. A similar result would follow if he merely reserved the right to alter the division of principal or income among his children without adding or changing any beneficiary.

These cases and countless others that could be readily imagined illustrate the striking tendency of Section 302(d) to operate in an unjust and unreasonable manner, if construed as the Government contends. This tendency is greatly magnified if the construction be applied, as in this case, to trusts created before the enactment of the statute.

If, however, power to make "any change" means power without limitation, including change for the benefit of the donor or his estate, these arbitrary incidents are avoided and the tax is laid upon a transfer which can be said to have some relation to the net estate.

For these reasons we submit that Section 302(d) should be construed to include only those interests subject to powers to change the enjoyment by alteration, amendment or revocation, "passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Section 401". *Reinecke* v. *Northern Trust Co.* (*supra*).

## ARGUMENT AS TO CONSTITUTIONALITY.

## IV.

**As applied to the transfers in this case, Section 302(d) would be confiscatory and unconstitutional, if construed as the Government contends.**

We submit that Section 302(d) would be unconstitutional, as applied to this case, if construed as the Government contends. In *Heiner* v. *Donnan* (285 U. S. 312) it was held that an attempt to measure a tax on one person's property by reference to the property of another was in violation of the ~~Fourteenth~~ Fifth Amendment. The Court quoted from *Hoeper* v. *Tax Commission* (284 U. S. 206) as follows:

> "We have no doubt that because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment * * *."

Therefore, if the trust property was not in some real sense the decedent's at his death, the introduction of its value into his net estate for purposes of taxation is clearly contrary to the constitutional provision.

As has already been pointed out, the decedent had divested himself of all title and interest. He could not recover the property or regain the use or enjoyment of it. When the gifts were made the property ceased to be a part of his estate and could not be brought back into it. His only relation to the property consisted of the reserved power to alter or modify but this he could not exercise for his own benefit.

As the Court below expressed it, decedent had "finally denuded himself" of the property (Opinion, R., 113). In this respect the present case presents a sharp contrast with such cases as *Chase National Bank* v. *United States,*

*Reinecke* v. *Northern Trust Co., Tyler* v. *United States,* or even *May* v. *Heiner.* In those cases, the decedent had reserved for himself till death either the possession or enjoyment or a control equivalent to the enjoyment and his estate might be said to be increased by the value of the possession or enjoyment. In this case, the decedent had finally denuded himself and that of which he has denuded himself cannot be brought back into the estate.

What the Circuit Court of Appeals has done, after admitting that the decedent had "finally denuded himself", is to impose upon the estate a tax upon the advantage accruing to the beneficial interests through the removal of the menace inherent in the power. This would turn this transfer tax into a succession tax. It would impose upon the estate a tax based upon the advantage accruing to the beneficiaries of the trust and would measure it under a sliding scale of rates based upon the value of the estate and of the trust property which formed no part of the estate. To tax in the decedent's estate the full value of property of which he had finally denuded himself because of the advantage accruing to the trust beneficiaries through the extinguishment of a power is manifestly arbitrary and capricious. (*Knowlton* v. *Moore,* 178 U. S. 41; *Nichols* v. *Coolidge; Heiner* v. *Donnan.*)

The actual relation of the decedent to the property *at his death* was no different from what it would have been if he had never owned the property and had received the power as donee. It would not be thought, of such a donee, that the trust property was in any sense his. The claim of right to tax, is therefore predicated on the *past* ownership, and has regard to the *past* transfers. Thus the real aim of §302(d), as the government construes it, is to tax past gifts *inter vivos.* This is unconstitutional under *Nichols* v. *Coolidge,* because all the transfers were made before the original enactment of §302(d) in the 1924 Revenue Act.

This proposed taxation with reference to *past* ownership is also unconstitutional under *Heiner* v. *Donnan* irrespective of priority in time as between transfers and legislation, because *Heiner* v. *Donnan* holds it is confiscatory to

tax transfers retrospectively by bringing the value into the measure of the estate at death, for these reasons (285 U. S. p. 332):

> "If it be a gift tax, it, nevertheless, is based, not upon the transfer of the gift, but upon the transfer of the estate; and upon the value of the estate, and not that of the gift. Obviously these are bases having no relation whatever to the gift. Moreover, the value of the gift is not to be determined as of the time when made, but, considered as a part of the estate, is to be fixed as of the date of the decedent's death—a condition so obviously arbitrary and capricious as, by itself, to condemn the tax, viewed as a gift tax as violative of due process. It is to be paid by the beneficiaries of the decedent, although it is impossible for them to share in the gift which has passed beyond recall. It is, therefore, a contribution to the government exacted of one person based *pro tanto* upon the wealth of another."

These same reasons refute the suggestion of the court below that the tax is on the extinguishment of the power. If the act could be so construed the case might be differentiated from *Nichols* v. *Coolidge* on the ground stated in *Reinecke* v. *Northern Trust Co.* Nevertheless, the Court of Appeals, in this case, gave recognition to the element of retrospection and sought to escape the consequence by arguing that the decedent could have relinquished the power after the enactment (Opinion, R., 114), a theory suggestive of laying a tax on a failure to make good one's escape. One is led to speculate in passing what the situation might be if in the interim the donor had become incompetent or otherwise incapacitated. But even if this should be thought to obviate objections under *Nichols* v. *Coolidge*, it obviates none of those pointed out in *Heiner* v. *Donnan*. That the power might have been relinquished does not alter the fact that the tax, viewed as one on the gifts to the trustee, is based, not on the transfer of the gifts, but on the transfer of the estate, and on the value of the estate and not on that of the gifts. It does not alter the fact that the value of the gifts is not determined as of the time when made, but, con-

sidered as a part of the estate, is to be fixed as of the date of the death, or the fact that the tax is to be paid by the beneficiaries of the decedent, although it is impossible for them to share in the gift which has passed beyond recall.

The opinion below makes no reference to *Heiner* v. *Donnan*. This may be accounted for by the court's belief that "*Congress may measure an excise as it will.*" (Opinion, R., 114.) But it is submitted that this is not the law and the present case is an excellent example. In *Heiner* v. *Donnan* an arbitrary *measure* for taxation was condemned, and the court, at page 326 of the 285th U. S., said:

> "That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process clause of the Fifth Amendment is settled. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24-25; *Tyler* v. *United States, supra*, p. 504."

To measure an excise on extinguishment of a limited power by the value of the property and not by the value of the power, basing it on the value of the estate and not on that of the power results in exactly the kind of arbitrariness condemned by this court in the passage quoted above on page 30. It presents, in this case, a tax of thousands of dollars on the extinguishment of a power without realizable money-value, measured by the value of property which the holder of the power could not touch in any way beneficial to himself. In short, it taxes him exactly in the same way as if he were the owner of the fee.

The difficulty of establishing a value of the power in the hands of the decedent in any way commensurate with the full value of the property is well illustrated by the extraordinary suggestion of the Government to which reference has been made on page 19. It is significant that resort must be had to a devious and questionable scheme to defeat the express terms of the trust in order to assign a value to the power and spell out for the decedent a control of the property for his own benefit.

The inequitable character of the tax is particularly illustrated in this case where the trusts were executed long before the enactment of the Statute. In *Milliken* v. *United States* (283 U. S. 15, at p. 20) this Court said:

> "This Court has held the taxation of gifts made, and completely vested beyond recall, before the passage of any statute taxing them, to be so palpably arbitrary and unreasonable as to infringe the due process clause."

This result was indicated if the tax burden "could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax." *Nichols* v. *Coolidge* (274 U. S. 531); *Untermyer* v. *Anderson* (276 U. S. 440.)

These trusts were made in 1918 and 1919, several years before the enactment of the provisions of the statute (Sec. 302-d), under which it is now proposed to include the property then transferred in the decedent's taxable estate. It is the contention of the Government, however, that the continuation until death of the power to alter or modify renders the property taxable and reliance is placed upon the case of *Reinecke* v. *Northern Trust Company*, in which it was held that a power of revocation rendered the property taxable, even though the instrument reserving the power had been executed prior to the passage of the statute.

A vital difference is however evident in the two situations thus presented. In the case of a power of revocation, while a grantor who made a trust prior to the enactment of the statute could not have understood or foreseen the burden of the tax, nevertheless, after the enactment of the statute, he possessed full power to repossess the property previously transferred and could restore himself to his original position, and therefore could make provision against the tax which would ultimately fall upon his estate. The option would still be open for him, and he would be free to act accordingly.

In the present case, however, the situation was wholly different. The decedent, when he made the transfers sev-

eral years before the enactment of the statute, not only could not have foreseen the tax burden, but by the terms of the transfers, he not only divested himself of the property but he made it impossible to repossess the property either for himself or his estate. When, therefore, the statute was enacted it was beyond his power to restore either himself or his estate to a position where the tax could be paid out of the property transferred. The theory of the tax is that the property previously transferred constituted a part of the decedent's net estate. And yet in this instance by no possibility could the property previously transferred be included among the assets from which the tax could be paid. To hold thus produces results which are arbitrary and unreasonable (*Heiner* v. *Donnan*) and in some conceivable circumstances may be almost fantastic.

To illustrate, let us suppose that many years prior to the enactment of the statute, an individual has transferred in trust one half of his estate under conditions similar to those in this case. Let us suppose that he has died during the past year. In the interim, the estate retained by him has suffered a severe shrinkage in value. If the value of the property transferred years previously be included in computing his net estate, the tax levied thereon would wipe out the entire estate remaining in his possession at his death. And yet he is and at all times has been powerless to recall the property transferred for the purpose of meeting the tax subsequently laid thereon by the government.

It is the arbitrary and burdensome character of this result which is commented on in *Nichols* vs. *Coolidge* (274 U. S. 531, at p. 542) as follows:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real

estate, transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Frew* v. *Bowers*, 12 Fed. (2nd) 625."

## V.

**Each of the original trusts was irrevocable as and when made. The attempt to revoke Trusts 1 and 2 was therefore ineffectual for that purpose. The indenture of November 27, 1926, therefore accomplished no transfer. Section 302(c) of the Act has no application.**

It is entirely clear that the original trusts made in 1918 and 1919 were irrevocable. The decedent reserved no power to revoke. The only powers he reserved were to modify or alter and these powers were limited to modifications or alterations not in favor of himself or his estate. Aside from these powers, the trusts were all ordinary conveyances in the usual form, which disposed of the entire right, title, and interest in the property. It is well settled that transfers of this character are irrevocable and that attempted revocations are ineffectual (*Garner* v. *Germania Life Insurance Co.*, 110 N. Y. 266; *Roberts* v. *Taylor*, 300 Fed. 257; *Nearpass* v. *Newman*, 106 N. Y. 47; *McPherson* v. *Rollins*, 107 N. Y. 316; *Levett* v. *Farnham*, 169 Mass. 1; *Dickey* v. *Goldschmidt* [N. Y.] 60 Misc. 258).

The reserved powers could not be construed as a power of revocation, for in fact they prohibit revocation (R., 45) thus:

> "* * * but this power to modify or alter is not intended and shall not be construed to include the right to the donor to make such modification or alteration in his own favor or in favor of his estate but

shall apply only so far as the interests of third parties are concerned."

Thus revocation was not legally possible and the attempted revocations were ineffectual. There was no transfer or delivery of the trusteed property which continued to remain in the possession of the original trustee. The instrument of November 27, 1926, conveyed nothing nor did it effect any transfer. At most its effect was merely to modify the terms of the original Trusts Nos. 1 and 2, which otherwise continued in full force and effect.

* * * * *

Since the transfers in this case were irrevocable it is controllingly settled by *Reinecke* v. *Northern Trust Co.* that the provision of section 302(c) bringing into the gross estate transfers intended to take effect in possession or enjoyment at or after death has no application.

## CONCLUSION.

**The decision of the Circuit Court of Appeals should be reversed.**

Respectfully submitted,

WALTER E. HOPE,
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RICHARD L. DAVISSON,
EDWARD N. PERKINS,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

**No. 466.**

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Will of WILLIAM H. PORTER, Deceased,

*Petitioners,*

*against*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## REPLY BRIEF FOR THE PETITIONERS.

WALTER E. HOPE,
*Attorney for the Petitioners.*

RICHARD L. DAVISSON,
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## REPLY BRIEF FOR THE PETITIONERS.

### I.

**The contention that, if the exercise of a power may be taxed, the failure to exercise it may be taxed, is not logical and is not supported by the authorities.**

The argument starts with the assumption that the decedent had "a general power to appoint by will." In point of fact, the power was *limited* so that the decedent and his estate could not benefit by it. The trust deed, moreover, specifically provides that any alteration shall be made—

> "by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to

> be recorded in the State of New York) delivered to the Trustee", etc.

The unusual care with which the instrument of alteration is described, including the requirement of acknowledgment, is hardly consistent with the exercise of the power by will and clearly contemplates action by the decedent during his lifetime.

It is to be noted in passing that the Act imposes no tax upon a power but only upon the *exercise* of a *general* power. Section 302 (f) of the Revenue Act of 1926. It is not laid on the failure to exercise the power.

The Government states at p. 14 of its brief—

> "If the exercise of a power may be taxed the failure to exercise it is likewise within the power of Congress. Citing *Chase National Bank* v. *United States*, 276 U. S. 327; *Reinecke* v. *Northern Trust Company*, 278 U. S. 339; *Gwinn* v. *Commissioner*, No. 31, October Term, 1932, decided December 5, 1932."

We submit that these cases support no such proposition. The basis for the tax in these cases was not the failure to exercise the power but the fact that decedent retained for himself until his death either an economic interest or the right to obtain it, so that an economic control for the settlor's benefit passed at death. Thus in the *Chase National Bank* case, he could until his death obtain for himself the proceeds of the insurance policies, or could borrow upon them. In the *Reinecke* case, he could until his death revoke the trusts and recover the property at will. In the *Tyler* case, he retained a very real and substantial use, enjoyment and benefit of the property until his death, whereupon the corresponding interest of the survivor was in effect doubled. The same consideration applies to *Gwinn* v. *Commissioner* (decided December 5, 1932) and *Third National Bank* v. *United States* (decided December 19, 1932). The case of *Corliss* v. *Bowers*, 281 U. S. 376, which the Government quotes at page 21 of its brief similarly involved the

case of a revocable trust, and the opinion clearly reveals that fact as the basis of the decision (p. 378).

In this case the decedent had transferred the property years before his death. At his death he had nothing but a power to alter the enjoyment of beneficiaries other than himself or his estate. He could not recall the property or its use or enjoyment for himself. At his death no interest was transferred from him to the beneficiaries. Their interests remained as before, except that a threat was removed. The situation resembled the case of a vested remainder liable to be divested upon the happening of an uncertain event.

At the time of his death, the relation of the decedent to the property was no different than it would have been if he had never owned the property and the power had been lodged in him by another owner by appropriate grant. And yet, upon the theory advanced by the Government, the failure of such a donee to exercise the power would be subject to tax.

## II.

The Government stresses the contention that the transfers were "incomplete". But the emphasis is mainly directed to the possibility of variation among the interests of the beneficiaries. It ignores the fact that as to the *donor* the transfer *was complete;* never again could he possess or enjoy any part of the property. He had "finally denuded himself". There was nothing further to be transferred from him at death.

Here again the Government cites the cases above referred to, ignoring the substantial interests which the respective decedents had in each instance retained for their own use or enjoyment. Thus it is stated (Brief, p. 16):

> "The power retained by the decedent left the interests of the beneficiaries in the present case no more complete until the decedent's death than the interests

> of the beneficiaries of the 'two trusts' in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339."

But in the *Reinecke* case, with respect to the "two trusts", the decedent reserved a power of revocation, so that at any time until his death he might have drawn back the entire property into his own possession. He had not "denuded himself."

Similarly the *Chase National Bank* case is quoted (Brief, p. 18). But the Court was there concerned with the power of the decedent at any time during his lifetime to possess himself of the entire surrender value of the insurance policies.

We submit that it is the certainty of the separation from the decedent during his lifetime and not the uncertainty of the interests of the beneficiaries, which is controlling in this case, involving a transfer tax on the estate of the decedent.

## III.

The Government has devoted much space to an effort to prove that the trusts here in question were revocable, presumably in the hope of bringing them within the ruling as to the "two trusts" in the *Reinecke* case. It is therefore of importance that this point be determined as a preliminary consideration.

What is generally meant by the term "revocable"? Certainly not the mere right to alter the interests of beneficiaries. In the general acceptance of the term, it includes the right to repossess the trust property and, if desired, to wipe out the trust entirely. This was the character of the revocability under consideration in the *Reinecke* case.

In that conception, it is entirely clear that the original trusts made by this decedent in 1918 and 1919 were irrevocable. He reserved no power to revoke. The reserved

powers could not be construed as a power of revocation, for in fact they prohibit revocation thus:

> "* * * but this power to modify or alter is not intended and shall not be construed to include the right to the donor to make such modification or alteration in his own favor or in favor of his estate but shall apply only so far as the interests of third parties are concerned."

As pointed out at p. 34 of our original brief, it is well settled that transfers of this character are irrevocable and that attempted revocations are ineffectual.

The instrument of November 27, 1926, was therefore wholly ineffectual for that purpose and the new trust deed (Helen Porter Davisson Trust No. 3) executed upon that day conveyed nothing nor did it effect any transfer. At most, its effect was merely to modify the terms of the original Trusts 1 and 2, which otherwise continued in full force and effect. The Government has apparently elected to adopt a contrary view, and in the footnote at the bottom of p. 36 of its brief, the statement is made:

> "The trustee accepted it as a new trust and regarded the former trusts as terminated."

We find no warrant for this statement in the Record, but on the contrary it was testified on behalf of the Trustee (R., p. 81) that the Trustee did not redeliver any part of the trust property to the decedent and that "if Mr. Porter had handed me an instrument purporting to revoke the trust and demanding the return of the securities, I would not have delivered them to him."

That the Government does not rely too strongly upon this position is further evidenced by its labored effort to work out a theoretical possibility of revocation through the operation of the laws of the State of New York. We have already made reference to this at page 19 of our original brief and will not further burden the Court. Suffice it to say that the scheme involves the finding of what the Court

below termed a "facile beneficiary" who would conspire in advance to assist in terminating the trust, and thereby restore the trust property to the donor, in deliberate violation of his covenant not to exercise his reserved power in favor of himself.

We have merely to comment that none of the New York Appellate Division cases cited by the Government in support of this enterprise involves a state of facts in which the donor had excluded himself from any benefit through exercise of the power, and we question, as did the Court below, whether any Court would sustain such a fraud upon the express terms of the power.

With further reference to the subject of revocability, the following statement is made at page 35 of the Government's Brief:

> "Moreover, the construction advanced by the petitioners would make Section 302 (d) wholly meaningless, for trusts subject to a power of revocation are taxable under Section 302 (c). *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339."

As a matter of fact, the Revenue Act of 1924, which included Section 302 (d), was approved on June 2, 1924. The decision in the *Reinecke* case which determined that revocable trusts were taxable under Section 401 (c) of the 1921 Act was not handed down till 1929, the decision of the Circuit Court of Appeals having been handed down in 1927. (24 Fed. [2nd] 91.) Hence, at the time Section 302 (d) was inserted in the Statute, it had not been held that revocable trusts were taxable.

## IV.

The Government dismisses the retroactive feature of the case by reference to *Reinecke* v. *Northern Trust Company*, *Third National Bank* v. *White*, *Tyler* v. *United States*, and *Gwinn* v. *Commissioner*.

We repeat that in all these cases the decedent had retained until his death either a substantial economic use or enjoyment, or the right to repossess for himself use or enjoyment of the property. At his death, therefore, something actually passed which was an appropriate subject for a tax, even though the Statute was enacted after the execution of the trust instrument.

In the present case, the decedent had not only divested himself of the property but he had made it impossible to repossess the property either for himself or his estate. At his death there was no interest to pass, because he had "finally denuded himself". The only transfers *from him* were those made to the trustee prior to the enactment of the Statute. Nor was it possible for him to restore himself to a position where he could make provision for the subsequently enacted tax which would ultimately fall upon his estate. It is again urged that taxation under these conditions violates the constitutional provision.

## CONCLUSION.

**The decision of the Circuit Court of Appeals should be reversed.**

Respectfully submitted,

WALTER E. HOPE,
*Attorney for the Petitioners.*

RICHARD L. DAVISSON,
EDWARD N. PERKINS,
*Of Counsel.*

FILE COPY

No. 466

# In the Supreme Court of the United States

OCTOBER TERM, 1932

ESTHER JACKSON PORTER, AS EXECUTRIX, AND RICHARD L. DAVISSON, AS SURVIVING EXECUTOR, OF THE ESTATE OF WILLIAM H. PORTER, DECEASED, PETITIONERS

*v.*

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT

# In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 466

ESTHER JACKSON PORTER, AS EXECUTRIX, AND RICHARD L. DAVISSON, as Surviving Executor, of the Estate of William H. Porter, Deceased, petitioners

*v.*

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT

### OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 189–194) is reported in 60 F. (2d) 673. The opinion of the Board of Tax Appeals (R. 85–104) is reported in 23 B. T. A. 1016.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 26, 1932. (R. 194–195.) The

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petition for a writ of certiorari was filed October 24, 1932. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

Whether, under Section 302(c) or 302(d) of the Revenue Act of 1926, there should be included in the measure of the gross estate the value of property transferred by the decedent in trust, but subject to the power of the decedent alone to modify or alter the trust in any way except in his own favor or in favor of his estate.

**DISCUSSION**

The decision of the court below in upholding the validity of Section 302 (d) of the Revenue Act of 1926 as applied to the trust in question is, as the petitioners contend, in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Brady* v. *Ham*, 45 F. (2d) 454. It is also in conflict with the result reached by the Court of Appeals of the District of Columbia in *Cover* v. *Burnet*, 53 F. (2d) 915.

Although we believe that the decision below is correct, we do not oppose the present petition because of the conflict of decisions referred to.

Respectfully submitted.

THOMAS D. THACHER,
*Solicitor General.*

NOVEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

FILE COPY

No. 466

# In the Supreme Court of the United States

OCTOBER TERM, 1932

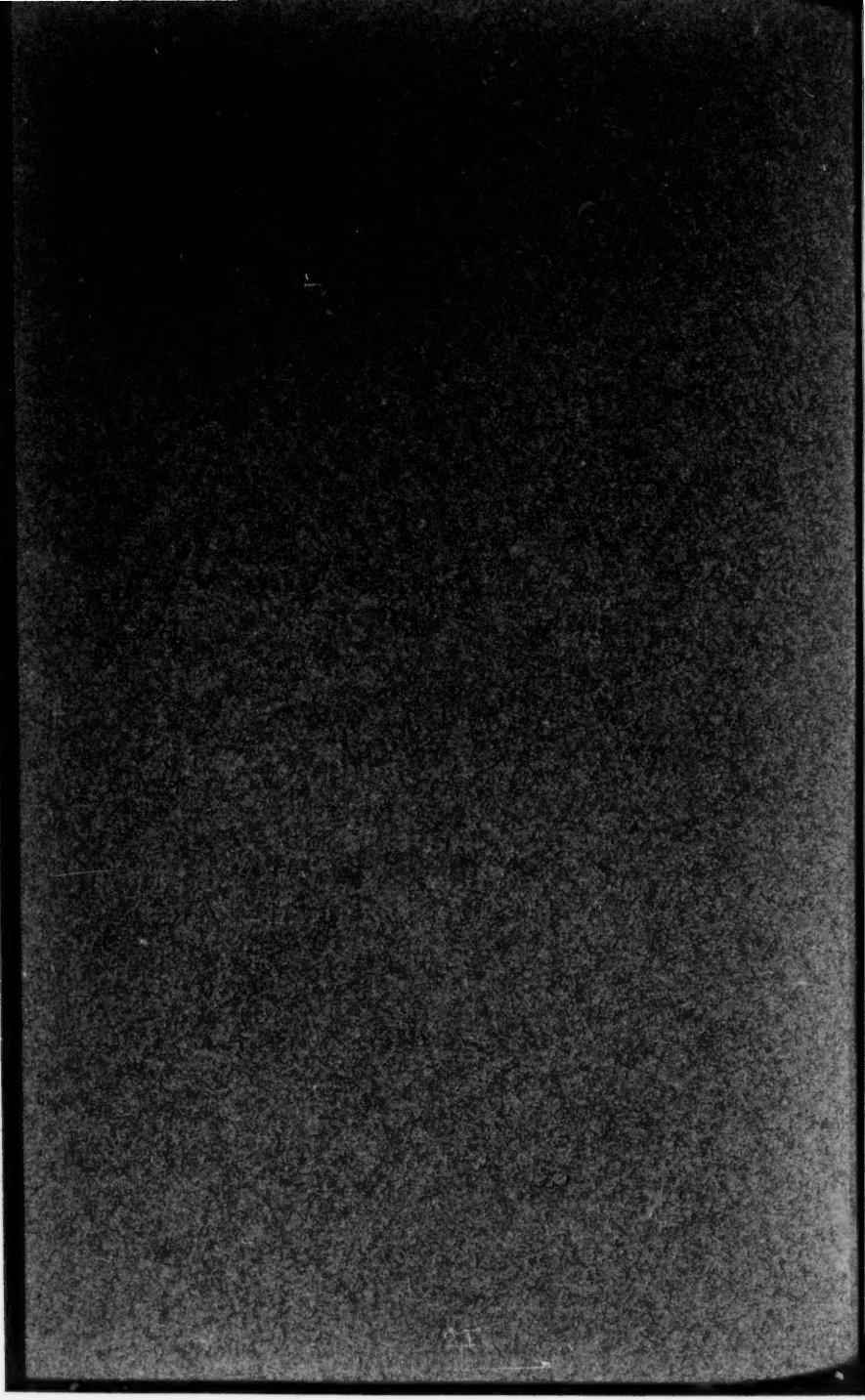
ESTHER JACKSON PORTER, AS EXECUTRIX, AND RICHARD L. DAVISSON, AS SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM H. PORTER, DECEASED, PETITIONERS

*v.*

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

*ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT



# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 2 |
| Summary of argument | 5 |
| Argument | 10 |
| I. Congress has power under the Constitution to provide that transfers such as those here in question shall be included in the measure of the estate tax | 10 |
| (A) The powers reserved by the decedent included a general power to appoint by will as well as the power to dispose of the property to others during life | 11 |
| (B) The transfers were not complete until the decedent's death | 15 |
| (C) The power which the decedent reserved was a valuable interest in the corpus of the trust | 25 |
| (D) Under the New York law, the decedent had the effective power to revoke the trusts even for his own benefit | 26 |
| II. Congress has exercised the power to provide that the property here in question shall be included in the measure of the estate tax | 30 |
| (A) The transfers were intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926 | 30 |
| (B) Section 302 (d) of the Revenue Act of 1926 requires the inclusion of the value of the property in the gross estate | 34 |
| Conclusion | 39 |
| Appendix A (statutes and regulations involved) | 40–43 |
| Appendix B (Congressional Committee reports) | 44 |


## CITATIONS


| Cases: | |
|---|---|
| *Aranyi* v. *Bankers Trust Co.*, 201 App. Div. 706 | 29 |
| *Blackburne* v. *Brown*, 43 F. (2d) 320 | 13 |
| *Brady* v. *Ham*, 45 F. (2d) 454 | 24 |

Cases—Continued. Page

*Bromley* v. *McCaughn*, 280 U. S. 124 ..... 14
*Bullen* v. *Wisconsin*, 240 U. S. 625 ..... 17
*Burnet* v. *Northern Trust Co.*, 283 U. S. 782 ..... 24, 33
*Chanler* v. *Kelsey*, 205 U. S. 466 ..... 13
*Chase National Bank* v. *United States*, 278 U. S. 327 ..... 14, 17, 23
*Commissioner* v. *Emery*, C. C. A. 7th, decided Nov. 26, 1932 ..... 23
*Countess of Roscommon* v. *Fowke*, 6 Bro. P. C. 158 ..... 12
*Corliss* v. *Bowers*, 281 U. S. 376 ..... 21
*Cover* v. *Burnet*, 53 F. (2d) 915 ..... 24
*Cruger* v. *Union Trust Co.*, 173 App. Div. 797 ..... 29
*DeGanay* v. *Lederer*, 250 U. S. 376 ..... 32
*Doe ex dem. Delegal* v. *Holloway*, 1 Stark. N. P. 431 ..... 12
*Faulkner* v. *Irving Trust Co.*, 231 App. Div. 87 ..... 29, 30
*Fidelity-Philadelphia Trust Co.* v. *McCaughn*, 34 F. (2d) 600, certiorari denied, 280 U. S. 602 ..... 13
*Franklin* v. *Chatham Phenix Nat. Bank & Trust Co.*, 234 App. Div. 369 ..... 29
*Fulham's Estate, In re*, 96 Vt. 308 ..... 31
*Guaranty Trust Co.* v. *Blodgett*, No. 217, Oct. Term, 1932, decided Jan. 9, 1933 ..... 32
*Gwinn* v. *Commissioner*, No. 31, Oct. Term, 1932, decided Dec. 5, 1932 ..... 14, 18, 31, 34, 37, 38
*Heiner* v. *Donnan*, 285 U. S. 312 ..... 23
*Hoeper* v. *Tax Commission*, 284 U. S. 206 ..... 23
*Hoskin* v. *Long Island Loan & Trust Co.*, 203 N. Y. 588, affirming, 139 App. Div. 258 ..... 29
*Jackson ex dem. Hammond* v. *Veeder*, 11 Johns. 169 ..... 12
*Kibbett* v. *Lee*, Hob. 312 ..... 12
*Klein* v. *United States*, 283 U. S. 231 ..... 19, 22, 32
*Lee* v. *Commissioner*, 57 F. (2d) 399, certiorari denied, 286 U. S. 563 ..... 13
*May* v. *Heiner*, 281 U. S. 238 ..... 24, 33
*Meyer* v. *Bank of Manhattan Trust Co.*, 232 App. Div. 228 ..... 30
*Milliken* v. *United States*, 283 U. S. 15 ..... 32
*Minis* v. *United States*, 66 C. Cls. 58, certiorari denied, 278 U. S. 657 ..... 13
*Morice* v. *Bishop of Durham*, 10 Ves. 522 ..... 26
*Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552 ..... 32
*O'Shaughnessy* v. *Commissioner*, 60 F. (2d) 235, No. 604, Oct. Term, 1932 ..... 23
*Pennsylvania Co.* v. *Lederer*, 292 Fed. 629 ..... 13
*Phillips* v. *Dime Trust & Safe Deposit Co.*, 284 U. S. 160 ..... 22, 32
*Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 ..... 14, 15, 16, 18, 21, 24, 27, 28, 32, 33, 35, 36
*Russell Motor Car Co.* v. *United States*, 261 U. S. 514 ..... 35
*Saltonstall* v. *Saltonstall*, 276 U. S. 260 ..... 17
*Schenck* v. *Ellingwood*, 3 Edw. Ch. 175 ..... 12
*Schwartz* v. *Fulton Trust Co.*, 119 Misc. 831 ..... 29

Cases—Continued. Page

*Shattuck, Matter of*, 193 N. Y. 446 ... 26

*Sperry* v. *Farmers' Loan & Trust Co.*, 154 App. Div. 447 ... 29

*Stratton* v. *United States*, 50 F. (2d) 48, certiorari denied, 284 U. S. 651 ... 13

*Third National Bank* v. *White*, decided December 19, 1932, No. 202, October Term, 1932 ... 19, 21, 22, 34, 37, 38, 39

*Tyler* v. *United States*, 281 U. S. 497 ... 19, 20, 21, 22, 37, 38

*Ward* v. *Stanard*, 82 App. Div. 386 ... 12

*Washburn* v. *White*, D. Mass., decided Nov. 29, 1932 ... 24

*Whitlock-Rose* v. *McCaughn*, 21 F. (2d) 164 ... 13

Statutes:

United States Statutes—

Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 202 ... 31

Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 402 ... 31

Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 402 ... 31

Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 302 ... 31

Revenue Act of 1926, c. 27, 44 Stat. 9—

Sec. 301 (U. S. C. App., Title 26, Sec. 1092) ... 40

Sec. 302 (U. S. C. App., Title 26, Sec. 1094) ... 40–42

New York Statutes:

N. Y. Laws, 1909, c. 247 ... 27

Personal Property Law, Sec. 23 ... 27, 28, 29, 30

Real Property Law, Sec. 163 ... 12

Miscellaneous:

American Law Institute, Restatement of Property, Secs. 1–7 ... 16

Bispham, Principles of Equity (9th ed.) Sec. 256 ... 26

Farwell, Powers (2d ed.) 173 ... 12

H. Rep. No. 179, 68th Cong., 1st sess., p. 65 ... 44

4 Kent, Commentaries (12th ed.) 330, 332–333 ... 11, 12

1 Perry, Trusts and Trustees (7th ed.), Sec. 108 ... 26

Treasury Regulations 70—

Art. 18 ... 43

Art. 19 ... 43

S. Rep. No. 398, 68th Cong., 1st sess., pp. 34–35 ... 44

1 Sugden, Powers (3d ed.) 312–316 ... 12

# In the Supreme Court of the United States

OCTOBER TERM, 1932

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No. 466

ESTHER JACKSON PORTER, AS EXECUTRIX, AND RICHARD L. DAVISSON, as Surviving Executor of the Estate of William H. Porter, Deceased, petitioners

*v.*

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

---

*ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE RESPONDENT

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### OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 111–116) is reported in 60 F. (2d) 673. The opinion of the Board of Tax Appeals (R. 49–62) is reported in 23 B. T. A. 1016.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 26, 1932. (R. 116–117.) The

petition for a writ of certiorari was filed October 24, 1932, and was granted November 14, 1932. (R. 117.) The jurisdiction of this Court rests on Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether Congress has power under the Constitution to provide that in computing the Federal estate tax there shall be included in the measure of the tax the value of property transferred by the decedent in trust, subject to the power of the decedent alone to modify or alter the trust in any way except in his own favor or in favor of his estate.

2. If Congress has such power, whether it has been exercised by Section 302 (c) or 302 (d) of the Revenue Act of 1926.

## STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp. 40–43.

## STATEMENT

The facts found by the Board of Tax Appeals (R. 44–49) may be summarized as follows:

The petitioners are the executors of the estate of William H. Porter, who died a resident of New York on November 30, 1926. (R. 44.)

On October 18, 1918, William H. Porter transferred to the Bankers Trust Company, as trustee, certain bonds. (R. 44.) On February 1, 1919, Porter transferred to the Bankers Trust Company,

as trustee, certain other bonds. (R. 44–45.) In each case a trust instrument was executed containing this provision (R. 45):

> Tenth. Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the trustee or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing, * * * and no one, born or unborn, shall have any right, interest, or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interest of third parties may be concerned.

These trusts are referred to as the Helen Porter Davisson Trusts Nos. 1 and 2.

In order to provide for two grandchildren born after the creation of these trusts, the decedent determined to exercise the power reserved to him in the tenth paragraph of the trust deeds. (R. 46.) Accordingly, on November 27, 1926, he directed to the trustee a letter with respect to each trust in which he said "I hereby revoke said Deed and

terminate the interests of all persons therein," and he directed the trustee to deliver the principal and income which it then held to itself "as Trustee under a new Deed of Trust." (R. 46.)

At the same time William H. Porter executed a new trust agreement conveying to the Bankers Trust Company, as trustee, the same securities which had been held on the earlier trusts. This new trust agreement contained instructions to the trustee as to the management of the funds and investment and reinvestment of the principal similar to those contained in the first two trusts. (R. 46–47.) The new trust also contained the same paragraph "Tenth" which has been set out above. (R. 47.) This trust is referred to as the Helen Porter Davisson Trust No. 3.

On October 18, 1918, and June 27, 1919, the decedent created two other trusts, each containing the same provisions by which the decedent reserved the right and power to modify and alter the trust as those in the trusts already referred to. (R. 47–48.) These trusts are referred to as the Jamie Porter Trusts Nos. 1 and 2.

The Commissioner of Internal Revenue included in the decedent's gross estate the sum of $211,125 as representing the value on the date of the decedent's death of the securities included in the Helen Porter Davisson Trust No. 3 executed on November 27, 1926. (R. 47.) The Board of Tax Appeals sustained this action. At the hearing before the Board the Commissioner moved to increase the

deficiency by including in the gross estate $212,000 in addition, as the value of the securities held under the Jamie Porter Trusts Nos. 1 and 2, referred to above. The Board upheld this action of the Commissioner. Three members dissented from the conclusions of the Board.

The petitioners appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed the decision of the Board, except on a question which is no longer in issue. (R. 116–117.)

## SUMMARY OF ARGUMENT

### I

A. The powers reserved by the decedent included a general power to appoint the property by will, as well as the power to appoint to others during life. The trust provided that the power might be exercised "by instrument in writing." A will of the decedent would plainly have been a valid exercise of the power, if it was also acknowledged in the manner required for a deed of real estate. Congress may validly impose an estate tax upon the exercise of a power of appointment by will. Since the exercise of a power may be taxed, the failure to exercise it is likewise within the taxing power of Congress.

The decedent also retained the power to control the disposition of the property to others during his life. This power was an incident to ownership at least as great as the power to make a gift of the property, which this Court has held may validly

be made the subject of a tax measured by the value of the property. *Bromley* v. *McCaughn*, 280 U. S. 124.

B. The transfers were not complete until the decedent's death; consequently Congress had power to include their value in the measure of the gross estate. This question turns on the effect of the power granted to the decedent in the trust instruments to "modify or alter" the trusts "in any manner," with the qualification that this power should not be exercised in his own favor.

The petitioners contend that the trusts were "irrevocable"; but this ignores the plain language of the trust instrument and the substantial effect of its provisions. The petitioners also state that the transfers in the present case were "complete" when the trusts were made; but in this, we believe, they have assumed the real issue in the case.

A brief analysis of the substance of the transactions shows (1) that the decedent retained important interests in the trust property, (2) that because of these interests which he retained the transfers to the beneficiaries of the trusts were only inchoate until his death, (3) that the effect of the decedent's death was to terminate the powers which he retained and thus to transfer to the beneficiaries of the trusts valuable property rights, and (4) that consequently there was a transfer effective on the decedent's death which is properly the subject of the estate tax.

The correctness of this conclusion is supported by several decisions of this Court, holding that when the interest of a beneficiary remains incomplete until the death of the settlor the termination of the settlor's power at his death may properly be the occasion for the imposition of the tax.

These decisions are not inapplicable because the tax involved is an estate tax and not a succession tax. Until the decedent's death, the beneficiaries had no power to dispose of the property; that power was retained by the decedent. After the decedent's death and as a result of it, the beneficiaries acquired the power of disposition. It is obvious that property rights which were the decedent's until his death became property rights of the beneficiaries after his death and as a result of his death. There was thus a transfer which may properly be made the subject of a transfer tax.

C. The power which the decedent reserved was a valuable interest in the corpus of the trust, and as such might validly be included in the measure of the estate tax. The decedent had unfettered power to determine who should be the beneficiary of the trusts. Such a power placed the decedent in a position to bargain with a new beneficiary. The value of this power retained by the decedent may fairly be valued by the value of the trust property.

D. The decedent did in fact and in substance have the power to revoke the trusts even for his own benefit. This conclusion follows, we believe,

from the provisions of Section 23 of the New York Personal Property Law as applied in the decisions of the New York courts. Under Section 23 the creator of a trust may revoke it at any time with the consent of the beneficiaries. In the present case it was within the power of the settlor to alter or amend the trusts at any time so as to make any person other than himself the beneficiary. Thus, he alone had the absolute and unfettered power to determine who should be the beneficiary. This power to determine who should be the beneficiary, together with the power to revoke the trust with the consent of the beneficiary granted by Section 23 of the New York Personal Property Law, gave the decedent in substance the power to revoke the trust.

II

A. The value of the trust property must be included in the decedent's gross estate under Section 302 (c) of the Revenue Act of 1926, as a transfer intended to take effect in possession or enjoyment at or after death. It is clear from the provisions of Sections 302 (c) and 302 (h) of the Revenue Act of 1926 that if the interests of the beneficiaries of these trusts were intended to take effect in possession or enjoyment at or after death, Congress intended that the value of the property transferred should be included in the gross estate. The trusts involved in this case were created not earlier than 1918, after the first enactment of the provisions

included in Section 302 (c) of the Revenue Act of 1926. Therefore, there can be no question of unconstitutionality on the basis of retroactivity.

The decedent had until his death absolute control over the interest of any beneficiary, and until his death it could not be determined whether the beneficiaries designated would receive anything. Where such dominion is retained over property that the identity of the beneficiaries and the extent to which they benefit can not be definitely determined until the settlor's death, clearly the disposition is one "intended to take effect in possession or enjoyment" at or after the settlor's death.

B. The value of the trust property must also be included in the decedent's gross estate under Section 302 (d) of the Revenue Act of 1926, since the decedent retained the power to modify or alter the trusts in any manner. Section 302 (d) is in plain and unmistakable language. So far as the question of construction is concerned, we believe that it is plain that Congress intended that the trust property involved in this case should be included in the measure of the gross estate.

Section 302 (d) may constitutionally be applied to trusts created before its enactment. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. The only difference between that case and this is that here the decedent's power to "modify or alter" the trusts "in any manner" was subject to the qualification that he might not make himself beneficiary.

But the interests of the beneficiaries were no less indefinite or uncertain because of this qualification of the power. The decedent retained the unfettered right and power to terminate their interests at any time. The ceasing of this power on his death was in substance the transfer to them at that time of valuable property rights. *Third National Bank* v. *White,* No. 202, October Term, 1932, decided December 19, 1932.

## ARGUMENT

The decision of this case turns on the effect of the provisions which were included in the tenth paragraph of each of the trust instruments and set out on p. 3, above. We contend in Point I that Congress may constitutionally provide that such transfers shall be included in the measure of the estate tax, and in Point II that Congress has exercised this power.

## I

### CONGRESS HAS POWER UNDER THE CONSTITUTION TO PROVIDE THAT TRANSFERS SUCH AS THOSE HERE IN QUESTION SHALL BE INCLUDED IN THE MEASURE OF THE ESTATE TAX

The constitutionality of a statute providing that transfers such as those involved in this case shall be included in the measure of the estate tax may be supported, we believe, on any one of four grounds. While these grounds are not wholly independent, they are presented in the four subdivisions of this Point below.

*A. The powers reserved by the decedent included a general power to appoint by will as well as the power to dispose of the property to others during life*

The power reserved by the decedent in this case was in terms to "modify or alter" the trusts "in any manner." The power thus included a general power to appoint the property by will, as well as the power to appoint to others during life. A power may be exercised by deed or will or simply in writing, unless the intention to restrict its exercise in some particular manner is expressed. 4 Kent, *Commentaries* (12th ed.) 330. The only qualification on the *manner* of exercising the power in this case was that it be—

> by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the Trustee * * *.

That this qualification did not require that the power be exercised by deed is plain, for it expressly provided that the power might be exercised "by instrument in writing." A will of the decedent would plainly have been a valid exercise of the power, if it was also "acknowledged or proved by him in the manner required for a deed of real estate."[1]

[1] Even if the will had not met all the formal requirements of a deed of real estate, the defect could have been corrected

*Jackson ex dem. Hammond* v. *Veeder*, 11 Johns. 169 (N. Y.), is almost exactly in point. There the power could be exercised (p. 170) "by an instrument in writing under her hand and seal, signed in the presence of two credible witnesses." The donee of the power exercised it by (p. 171) "her last will and testament, duly signed, sealed and published in the presence of three credible witnesses." The court held (p. 171):

> There can be no doubt that the instrument by which the power was attempted to be executed, comported with the directions of the power. It was an instrument in writing, under her hand and seal, and signed in the presence of two credible witnesses, and was intended by her as an execution of the power being made with express reference to it.

To the same effect are *Kibbett* v. *Lee*, Hob. 312; *Countess of Roscommon* v. *Fowke*, 6 Bro. P. C. 158; *Doe ex dem. Delegal* v. *Holloway*, 1 Stark. N. P. 431; 1 Sugden, *Powers* (3d Am. ed.) 312–316; Farwell *Powers* (2d ed.) 173.

The fact that the power reserved by the decedent to alter or amend the trust did not allow him to make himself beneficiary is obviously not significant. The donee of a general power to appoint by will can never appoint the property to himself. Nor is the question affected by the provision that

in equity. *Ward* v. *Stanard*, 82 App. Div. 386; *Schenck* v. *Ellingwood*, 3 Edw. Ch. 175 (N. Y.); see N. Y. Real Property Law, Sec. 163; 4 Kent, *Commentaries* (12th ed.) 332–333.

the alteration could not be made in favor of the decedent's "estate." His estate could not use or enjoy the property; " estate " is simply a shorthand expression to include a number of persons, such as legatees, heirs, or creditors, and the decedent had the power to appoint to those persons if he chose.

It is apparently well settled that Congress may validly impose an estate tax upon the exercise of a power of appointment by will. *Lee* v. *Commissioner,* 57 F. (2d) 399 (App. D. C.), certiorari denied, 286 U. S. 563; *Stratton* v. *United States,* 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 284 U. S. 651; *Blackburne* v. *Brown,* 43 F. (2d) 320 (C. C. A. 3d); *Fidelity-Philadelphia Trust Co.* v. *McCaughn,* 34 F. (2d) 600, 603 (C. C. A. 3d), certiorari denied, 280 U. S. 602; *Minis* v. *United States,* 66 C. Cls. 58, certiorari denied, 278 U. S. 657; *Whitlock-Rose* v. *McCaughn,* 21 F. (2d) 164 (C. C. A 3d); *Pennsylvania Co.* v. *Lederer,* 292 Fed. 629 (E. D. Pa.). See *Chanler* v. *Kelsey,* 205 U. S. 466, 478–479. The constitutionality of the tax does not depend upon the time when the power was created; the tax may be imposed upon the exercise of a power created before 1916. *Lee* v. *Commissioner, supra; Stratton* v. *United States, supra.*

It is true that Section 302 (f) of the Revenue Act of 1926 (*infra,* p. 42) applies only to the *exercise* of a power of appointment. But we are here concerned only with the constitutional authority of

Congress. If the exercise of a power may be taxed, the failure to exercise it is likewise within the taxing power of Congress. *Chase National Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Gwinn* v. *Commissioner,* No. 31, October Term, 1932, decided December 5, 1932.

In addition to the general power to dispose of the property by will, the powers reserved by the decedent enabled him at any time during his life to revoke and annul the interest of any beneficiary named in the trust and appoint a new beneficiary.[2] The decedent thus retained the complete and unfettered power to control the disposition of the property to others. This power was an incident of ownership at least as great as the power to make a gift of the property, which this Court has held may validly be made the subject of a tax measured by the value of the property. *Bromley* v. *McCaughn,* 280 U. S. 124. Since a gift of the property would have been within the taxing power of Congress, it would seem to follow necessarily that the termination of the power to give the property is likewise subject to taxation by Congress.

The death of the decedent resulted in the termination of a general power to appoint the property by will, and in the termination of the power to give

[2] This power was in fact exercised as to the Helen Porter Davisson Trusts Nos. 1 and 2 by the creation of the Helen Porter Davisson Trust No. 3 on November 27, 1926. See p. 36, *infra.*

the property to others. These events, occurring at death, and as a result of death, were the proper subject of an estate tax.

### *B. The transfers were not complete until the decedent's death*

A brief analysis of the trust instruments shows, we believe, that (1) the decedent retained important interests in the trust property, (2) because of these interests which he retained the transfers to the beneficiaries of the trusts were only inchoate until his death, (3) the effect of the decedent's death was to terminate the powers which he retained and thus to transfer to the beneficiaries of the trusts valuable property rights, and (4) that consequently there was a transfer effective on the decedent's death which is properly the subject of the estate tax.

Before the trusts were created in the present case the decedent was the complete owner of the property now in question. When he created the trusts he disposed of those interests in the property which are known as the "legal title," but this alone was of course not enough to keep the property from being subject to the estate tax at his death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. Besides disposing of the "legal title" he endeavored to divest himself of the right to use the property directly for his own benefit. But this did not make the transfer complete, for he retained the power to "modify or alter" the trusts "in any manner," and

thus retained to himself many of the important interests in the property.[3]

The power retained by the decedent left the interests of the beneficiaries in the present case no more complete until the decedent's death than the interests of the beneficiaries of the "two trusts" in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. They were subject to termination at any time during the settlor's life and without restriction, so far as the beneficiaries were concerned. No plainer demonstration of the incompleteness of the transfers could have been made than that actually included in the tenth paragraph of the trusts that "no one, born or unborn, shall have any right, interest or estate under this indenture except subject to the proper modification or alteration thereof." The decedent had until his death absolute control over the interest of any beneficiary, and until his death it could not be determined whether the beneficiary designated would receive anything.

Such a right of control residing in the settlor is not compatible with the contention that this was a completed transfer. At the decedent's death, and then only, his power to control the economic enjoyment of the property ceased. There was then a transfer from the decedent to the beneficiaries of interests which for the first time made them the owners of the property. This transfer substan-

[3] Compare the analysis in the American Law Institute's Restatement of Property, Sections 1–7.

tially affected dominion and control over the property. Occurring at the decedent's death and occasioned by his death, it may properly be made the subject of the estate tax.

The correctness of this conclusion is supported by several decisions of this Court holding that, when the interest of a beneficiary remains incomplete until the death of the settlor, the termination of the settlor's power at his death may properly be made the subject of the estate tax.[4] Thus, in *Chase National Bank* v. *United States*, 278 U. S. 327, this Court said (p. 338):

> Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits

[4] In *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271, involving a State succession tax, it was said: "So long as the privilege of succession has not been fully exercised it may be reached by the tax. * * * A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. *Bullen* v. *Wisconsin*, 240 U. S. 625. The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. *And so the property passing to the beneficiaries here was acquired only because of default in the exercise of the power during the donor's life* and thus was on his death subject to the state's power to tax as an inheritance." (Italics ours.)

The power of the settlor to change or terminate the trust in the *Saltonstall case* could not be exercised by the settlor alone, but required the "concurrence of one trustee." (276 U. S. 268.) But this limitation on the settlor's power was not regarded by this Court as significant.

> of property which is the real subject of the tax. * * *. And the nonexercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, *Bullen* v. *Wisconsin*, 240 U. S. 625; * * *.

And later in the same opinion language was used which seems to us practically conclusive in the present case (p. 339):

> As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death. *Stebbins* v. *Riley*, 268 U. S. 137.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345, this Court said that "a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death." And in the recent case of *Guinn* v. *Commissioner*, decided December 5, 1932, No. 31, October Term, 1932, this Court, referring to the power of a joint tenant to sever the tenancy, and thus to destroy the right of survivorship, said:

> Cessation of this power after enactment of the Revenue Act of 1924 presented proper occasion for imposition of the tax. The death became the generating source of defi-

nite accessions to the survivor's property rights.

See also *Klein* v. *United States*, 283 U. S. 231.

Most of the petitioners' contentions, we believe, are answered by the decisions of this Court in *Tyler* v. *United States*, 281 U. S. 497, and in *Third National Bank* v. *White*, decided December 19, 1932, No. 202, October Term, 1932. This Court is, of course, familar with the language used in its opinion in the *Tyler case*, and specifically referred to in the *per curiam* decision in the *Third National Bank case*, and it will not be necessary to repeat it here. Practically every sentence of the opinion is directly applicable to the situation in this case. Here "the event is death," and "the result which is made the occasion of the tax is the * * * enlargement of property rights"; for death destroyed the decedent's power to "modify or alter" the trusts "in any manner" and thus made irrevocable and complete interests which until death had been revocable and incomplete. Here "death has brought into being or ripened" for the beneficiaries "property rights." The death of the decedent was "the 'generating source' of important and definite accessions to the property rights" of the beneficiaries. And finally "To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to" the beneficiaries, but which came to them "as a pure gift from" the decedent, "and which, as a consequence of the latter's death, was relieved from restric-

tions imposed" by the trust instruments "so as to produce in the [beneficiaries] the right of sole proprietorship, is obviously neither arbitrary nor capricious." 281 U. S. at 504–505.

From these cases it is clear that when the economic enjoyment of property remains subject to the control of a person during his lifetime and passes to another at his death only because he has not exercised a power which he might freely have exercised at any time during his life, the property may properly be made subject to the estate tax. The fact that the decedent's power could not be exercised so as to make himself a beneficiary does not limit the applicability of these cases. The interests of the beneficiaries were no more definite on that account; they were no less subject to the decedent's control until his death. The court below aptly described the situation in its opinion (R. 113):

> Though he has finally denuded himself, he controls the disposition while he lives; the existing limitations are conditional upon his pleasure. A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends.

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We are not unaware that the tax involved in this case is an estate tax and not a succession tax. It

is the same tax whose application was sustained in the *Tyler* and *Third National Bank cases*. The petitioners' contentions, we believe, are based on their failure to recognize that the powers which the decedent reserved were themselves substantial interests in the property and that as a result of the decedent's death the interests represented by these powers passed from the decedent to the beneficiaries, bringing to them substantial accessions to their property rights equivalent to those lost by the decedent. The fact that the decedent's relation to the property was known as a power rather than as an estate did not mean that he did not have a real interest in the property whose transfer could be subjected to tax. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *supra*. In *Corliss* v. *Bowers*, 281 U. S. 376, this Court said (p. 378) that—

> taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—

and that "from the point of view of taxation there would be no difference" whether or not the taxpayer in a strict sense had title. The Court continued:

> The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power.

Until the decedent's death, the beneficiaries had no power to dispose of the property; that power was retained by the decedent. After the decedent's

death and as a result of it, the beneficiaries acquired the power of disposition. Thus, property rights which were the decedent's until his death became property rights of the beneficiaries after his death and as a result of his death. There was thus a transfer, since the primary meaning of that word is to "cause to pass from one person or place to another."

The petitioners apparently concede that the beneficiaries acquired property rights at the decedent's death and as a result of his death. (Br. 17, 29.) If the beneficiaries acquired property rights by reason of the decedent's death, where did they come from? Whose rights were they before the decedent's death? It is obvious that they were the decedent's, and that as a result of his death they were transferred to the beneficiaries.

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The petitioner's contention (Br. 29–31) that the tax is unconstitutional because measured by the full value of the trust property is fully met by several decisions of this Court. In *Tyler* v. *United States*, 281 U. S. 497, *supra*, *Phillips* v. *Dime Trust Co.*, 284 U. S. 160, *supra*, and *Third National Bank* v. *White*, No. 202, October Term, 1932, decided December 19, 1932, *supra*, a tax measured by the entire value of the property was held valid, although the interest of the decedent at the moment of death, and of his estate after death, was *nil*. In *Klein* v. *United States*, 283 U. S. 231, the entire

value of a remainder was taxed, although the interest of the survivor was substantial and irrevocable. In *Chase National Bank* v. *United States*, 278 U. S. 327, *supra*, the tax was measured by the entire proceeds of the insurance policy, although the surrender value while the decedent lived was much less than this amount, and the proceeds after his death were not available to his estate. This Court specifically disposed of the question in the quotation set out on p. 18, *supra*. See also *O'Shaughnessy* v. *Commissioner*, 60 F. (2d) 235 (C. C. A. 6th), now pending on petition for certiorari, No. 604, October Term, 1932; *Commissioner* v. *Emery*, C. C. A. 7th, decided November 26, 1932. These cases establish that the completion of the shifting of the economic benefits of property justifies a tax measured by the value of the property.

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Nothing contrary to our contentions was decided in *Heiner* v. *Donnan*, 285 U. S. 312. The transfers there involved were fully made before the decedent's death without the reservation of any powers. Nor is there here any taxing of A on the property of B, which was condemned in *Heiner* v. *Donnan* and in *Hoeper* v. *Tax Commission*, 284 U. S. 206. In the present case the beneficiaries had no property which was not subject to the plenary power of the decedent until his death. The petitioners also invoke *Heiner* v. *Donnan*, *supra*, in support of an argument that the Government is here

trying to impose a gift tax on a past transfer effected when the trusts were created. (Br. 29–30.) But the Government makes no such contention. The transfer which we are seeking to tax occurred at the decedent's death and because of it; it was not consummated by the creation of the trusts. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *supra*.

The trust involved in *Brady* v. *Ham*, 45 F. (2d) 454 (C. C. A. 1st), was established in 1911. The decision is erroneous, we believe, because the court ignored the fact that power over property is an interest in the property, that the retention of such a power constitutes the retention of an important interest in the property, and that the effect of the ceasing of the power on the decedent's death is in substance a transfer to the beneficiaries occasioned by the decedent's death. *Brady* v. *Ham* was reluctantly followed as a controlling precedent by the District Court for Massachusetts in *Washburn* v. *White*, decided November 29, 1932, Prentice-Hall Federal Tax Service, 1933, par. 403. It is difficult to tell the grounds upon which the Court of Appeals of the District of Columbia based its decision in *Cover* v. *Burnet*, 53 F. (2d) 915. For similar reasons, however, that decision seems to us erroneous.[5]

[5] *May* v. *Heiner*, 281 U. S. 238, and *Burnet* v. *Northern Trust Co.*, 283 U. S. 782, related only to the construction of Section 402 (c) of the Revenue Acts of 1918 and 1921, and not to the *power* of Congress. They are accordingly referred to *infra*, p. 33.

### *C. The Power which the Decedent Reserved was a Valuable Interest in the Corpus of the Trust*

The decedent retained the power to "modify or alter" the trusts involved in this case "in any manner." The only qualification on this power was that the decedent might not make such "modification or alteration in his own favor or in favor of his estate." This power thus retained was a valuable asset of the decedent's estate, and as such might validly be included in the measure of the estate tax.

The decedent had unfettered power to determine who should be the beneficiary of the trust. He could at any time have terminated the interests of the beneficiaries named in the original trust instruments and have designated any person he chose in their stead. Obviously such a right had a tangible pecuniary value. Despite the fact that the property had been placed in trust the powers reserved placed him in a position to bargain with a new beneficiary. And since it was within the decedent's power without restriction to direct the trustee to transfer the entire corpus of the trust to any person he might designate, the value of the power which the decedent reserved may fairly be measured by the value of the trust corpus. There is no reason why he could not have obtained that amount for a sale of the right to be the beneficiary of the trusts, or (allowing for a nominal fee to the new beneficiary) so nearly that amount that the difference may be disregarded. The beneficiaries named in the

original trust instrument could not have defeated the claims of purchasers for value who might thus have been substituted as beneficiaries of the trusts. 1 Perry, *Trusts and Trustees* (7th ed.), Sec. 108. Obviously such a right was a right in the corpus of substantial pecuniary value which could properly be included in measuring the tax on the transfer of the decedent's estate.

Such an appointment would not be invalid as a "fraud" on the power. The law as to fraud on powers relates only to special powers to appoint among a limited class.[1] In such cases the donee or holder of the power is in effect a trustee of the power. But here the power is not a special power. The settlor could not be a trustee for all the world except himself. It is well settled that a noncharitable trust with indefinite beneficiaries is not enforceable. *Morice v. Bishop of Durham*, 10 Ves. 522; *Matter of Shattuck*, 193 N. Y. 446.

*D. Under the New York Law, the Decedent had the Effective Power to Revoke the Trusts Even for his own Benefit*

Under the law of New York, we submit that William H. Porter did, as a substantial matter, re-

[1] The quotation in the petitioners' brief (Br. 20) from Bispham's Principles of Equity (9th ed.), Sec. 256, when put in its context holds no more than this. The sentence immediatley following the petitioners' quotation reads as follows: "If a father has a power to appoint among children, and agrees with one of them, for a sum of money, to appoint to him, such appointment would be void."

tain the power to revoke the trusts involved in this case even for his own benefit. Consequently there can be no question that the value of the property held upon the trusts was properly included as a part of his gross estate for Federal estate tax purposes. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

This conclusion follows, we believe, from the New York statutes and decisions relating to trusts. Section 23 of the New York Personal Property Law[7] provides that:

> Upon the written consent of all persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof.

Under this provision the creator of a trust may revoke it at any time with the consent of the beneficiaries.

It may be conceded for the purposes of this case that in the usual situation the reservation of a power to revoke with the consent of the beneficiary is not sufficient to make the disposition subject to the Federal estate tax. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *supra*. But the reason upon which this result is based is that in the usual case

[7] This provision was originally enacted in 1909. New York Laws, 1909, c. 247.

the interest of the beneficiary is adverse to the creator of the trust. This reason was stated in *Reinecke* v. *Northern Trust Co., supra,* in these words (p. 346):

> Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all pracical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

But this reasoning is not applicable in the instant case. The beneficiaries named in the original deeds of trust were not to be consulted. The settlor of the trusts was free to alter or revoke their interests as he might see fit. No one could dispute his power or prevent its exercise. He alone had the absolute and unfettered power to determine who should enjoy the property and he retained this power until he died.

The settlor might have made anyone the sole beneficiary. Free to choose from all the world, no doubt he could find a beneficiary, his lawyer perhaps, his best friend, or a member of his family, who upon being named the sole beneficiary would consent to revoke the trust as provided in Section 23 of the Personal Property Law. He took no risk in naming a beneficiary for this purpose, for if the beneficiary withheld his consent the settlor could alter the trust and name another more trustworthy to carry out his wishes. Thus, through the

retained control and dominion over the property the settlor could easily be rid of the self-denying limitation which he imposed upon its exercise whenever he desired to do so.

The decisions of the courts of New York sustain such a transaction as that outlined in the previous paragraph. Section 23 of the Personal Property Law applies to a trust even though it is specifically provided in the trust that it shall be irrevocable. *Franklin* v. *Chatham Phenix Nat. Bank & Trust Co.*, 234 App. Div. 369; *Faulkner* v. *Irving Trust Co.*, 231 App. Div. 87; *Aranyi* v. *Bankers Trust Co.*, 201 App. Div. 706; *Schwartz* v. *Fulton Trust Co.*, 119 Misc. 831.[8] Consequently it is immaterial that the trusts expressly provided that Porter's power to alter or amend should not extend so as to make him or his estate beneficiaries. The powers which Porter might exercise were two: (1) that reserved in the instrument creating the trust, *and* (2) that specifically granted by Section 23 of the Personal Property Law. The combined effect of these two powers was to make the trust revocable by Porter at any time until his death.

The New York courts have held that the creator of a trust having the power to alter or amend it may

[8] This conclusion is also supported by the decisions holding that Section 23 is applicable to trusts created before it was enacted, when no such power to revoke was contemplated. *Hoskin* v. *Long Island Loan & Trust Co.*, 203 N. Y. 588, affirming *per curiam*, 139 App. Div. 258; *Sperry* v. *Farmers' Loan & Trust Co.*, 154 App. Div. 447; *Cruger* v. *Union Trust Co.*, 173 App. Div. 797.

exercise that power by naming new beneficiaries, and then, with the consent of the new beneficiaries, may revoke the trust under Section 23 of the Personal Property Law. *Meyer* v. *Bank of Manhattan Trust Co.*, 232 App. Div. 228, and *Faulkner* v. *Irving Trust Co.*, 231 App. Div. 87, both involved trusts very similar to the trusts now in question. In each case the settlor exercised his power to change the beneficiary, and then, with the consent of the new beneficiary, revoked the trust. It was held that the revocations were effective and that the trustee must deliver up the trust propery to the settlor.

## II

### CONGRESS HAS EXERCISED THE POWER TO PROVIDE THAT THE PROPERTY HERE IN QUESTION SHALL BE INCLUDED IN THE MEASURE OF THE ESTATE TAX

### *A. The Transfers were intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926*

Section 302 (c) of the Revenue Act of 1926 (*infra*, pp. 40–41) provides that the value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property—

> To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, * * * intended to take effect in possession or enjoyment at or after his death * * *.

By Section 302 (h) of the Revenue Act of 1926 (*infra*, p. 42) this provision is made to apply to all trusts whether created "before or after the enactment of this Act." It is therefore clear that if the interests of the beneficiaries of these trusts were intended to take effect in possession or enjoyment at or after death Congress intended that the value of the property transferred should be included in the gross estate.[9] *Gwinn* v. *Commissioner*, decided December 5, 1932, No. 31, October Term, 1932.

The provisions included in Section 302 (c) of the Revenue Act of 1926 were present with no material difference in wording in each of the prior Revenue Acts beginning with 1916.[10] The trusts involved in this case were created not earlier than

[9] The following language of the Supreme Court of Vermont in *In re Fulham's Estate*, 96 Vt. 308, 314, is pertinent: "Then, too, we must remember that the section under consideration is not the one that provides for taxing inheritances, direct or collateral, but the one intended to prevent the evasion of such taxes. The very purpose of its enactment was to make it impossible to escape such taxes by transfers merely colorable or fictitious. The policy of such statutes—now in force in many of the states—is that the owner of property shall not evade the tax, except by full and effective transfers made during his lifetime. * * * Surely such a statute should be carefully considered and liberally construed in favor of the taxing power * * * lest its purpose be easily circumvented by designing persons. For, a construction that would facilitate evasion should be avoided."

[10] Sec. 202 (b) of the Revenue Act of 1916; Sec. 402 (c) of the Revenue Act of 1918; Sec. 402 (c) of the Revenue Act of 1921; Sec. 302 (c) of the Revenue Act of 1924.

1918. Therefore, if Section 302 (c) is otherwise applicable, there can be no question of unconstitutionality on the basis of retroactivity, since the original enactment of the provision antedated the creation of the trusts. *Milliken* v. *United States*, 283 U. S. 15; *Klein* v. *United States*, 283 U. S. 231; *Phillips* v. *Dime Trust & Safe Deposit Co.*, 284 U. S. 160; *Guaranty Trust Co.* v. *Blodgett*, No. 217, October Term, 1932, decided January 9, 1933.

Obviously, the purpose of the settlor in reserving the powers which he did in the tenth clause of the trust was to retain full control and dominion over the interest of each beneficiary, so that none of the beneficiaries named in the original trust instruments might have a definite and final interest beyond *his* control so long as *he* lived. The transfer of the trust property was "intended to take effect in possession or enjoyment at or after" the decedent's death. Certainly the "ordinary and usual sense" (*DeGanay* v. *Lederer*, 250 U. S. 376, 381; *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560) of the words used in Section 302 (c) of the Revenue Act of 1926 would require the inclusion of the property held on the trusts involved in this case.

This construction was adopted by this Court in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348, where the words "to take effect in possession or enjoyment at or after his death" were expressly

construed to include interests "passing from the possession, enjoyment *or control* of the donor at his death." (Italics ours.) Here, the decedent had until his death absolute *control* over the interest of the beneficiary, and the property passed from the *control* of the decedent only at his death. The disposition, therefore, was clearly "intended to take effect in possession or enjoyment" at or after the settlor's death, and was thus within the terms of Section 302 (c).

Cases such as *May* v. *Heiner,* 281 U. S. 238, and *Burnet* v. *Northern Trust Co.,* 283 U. S. 782, hold nothing to the contrary. In those cases the transfers were irrevocable. No power was reserved to change the trusts after they were declared. No power, no dominion, and no control remained with the transferor until death. His only interest was a life estate which ended when he died. No power was relinquished at the transferor's death which in any way affected the transfers previously made. *Reinecke* v. *Northern Trust Co., supra,* so far as it related to the five trusts held not taxable, was a similar case. The petitioners refer to the "five trusts" as ones over which the decedent had retained powers. But those powers could only be exercised with the concurrence of some of the beneficiaries, so that the decedent's reserved interest was in fact no greater, as this Court held (p. 346), than "if the gift had been absolute."

*B. Section 302 (d) of the Revenue Act of 1926 requires the inclusion of the value of the property in the gross estate*

Section 302 (d) of the Revenue Act of 1926 (*infra*, pp. 41–42) is in plain and unmistakable language. It provides that there shall be included in the decedent's gross estate the value of any property—

> of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power * * * to alter, amend, or revoke, * * *.

Applying the words of the statute, it is, of course, plain that the decedent made transfers, that these transfers were in the form of trusts, and that the interests under these trusts were subject at the date of the decedent's death to his power to alter or amend the trusts. By Section 302 (h) it is provided that such property shall be included in the gross estate whether the trusts were created "before or after the enactment of this Act." Therefore, so far as the question of construction is concerned, it is plain that Congress intended that the trust property involved in this case should be included in the measure of the gross estate. *Gwinn* v. *Commissioner*, decided December 5, 1932, No. 31, October Term, 1932; *Third National Bank* v. *White*, decided December 19, 1932, No. 202, October Term, 1932.

The petitioners present an argument that the words "alter, amend, or revoke" in Section 302 (d) should be construed to apply only to a power of revocation. They invoke the maxim *noscitur a sociis*. But such a construction is plainly unwarranted. It is the equivalent of excising from the statute the words "alter" and "amend" which Congress plainly intended to have their usual meaning.[11] Moreover, the construction advanced by the petitioner would make Section 302 (d) wholly meaningless, for trusts subject to a power of revocation are taxable under Section 302 (c). *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. Plainly *noscitur a sociis* has no application here. *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519. And the petitioners' construction is not aided by the sentence from the report of the Ways and Means Committee which is printed twice in the petitioners' brief. (Br. 22, 25.) The full report of the Committee relating to Section 302 (d) is set out in Appendix B (*infra*, p. 44); it shows clearly the intention of Congress to tax any trust where the interests of the beneficiaries is subject to a power of *change* in the settlor.

[11] Substantially the same argument is made in one of the briefs filed by *amici curiae*, where it is urged that the words "any change" should in effect apply only where a power to revoke has been reserved. This contention ignores the fact that when Congress used the words "alter, amend, or revoke" it obviously meant to include more than mere powers to revoke.

The petitioners also call to their aid supposed cases where the power to change reserved to the settlor might be very slight, and they seek comfort in the fact that difficulties might be found in the way of applying the statute in such a case. (Br. 22, 26, 27.) It will be time enough to deal with those cases when they arise. Doubtless powers might be reserved so meager that their termination would not furnish a proper basis for taxation. But no meager power is involved in this case. The powers reserved here were to "modify or alter" the trusts "in any manner." The settlor's power over the interests of any beneficiary was absolute, complete, and unqualified. A transfer subject to such a power is plainly within the terms of Section 302 (d). There can be no doubt that Congress has exercised the power to include these transfers in the measure of the gross estate.

These provisions of Section 302 (d) were first included in the Revenue Act of 1924; but they may constitutionally be applied, we believe, to trusts created before that enactment.[12] This follows from the decision in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. The only difference between that case and this is that here the decedent's power

[12] It is not conceded that the Helen Porter Davisson Trust No. 3 was created before the enactment of the Revenue Act of 1924. The Helen Porter Davisson Trusts Nos. 1 and 2 were created in 1918 and 1919, subject to the decedent's power to "modify or alter" in any manner except that he might not make himself a beneficiary. On November 27, 1926, the decedent exercised this power by instruments in

to "modify or alter" the trusts "in any manner" was subject to the qualification that he might not make himself beneficiary. But the interests of the beneficiaries were no less indefinite and uncertain because of this qualification on the power. The decedent retained the unfettered right and power to terminate their interests at any time. The ceasing of this power on his death was in substance a transfer to them at that time of valuable property rights. Since this transfer took place at the decedent's death, after the enactment of the Revenue Act of 1926, there is no question of retroactivity involved, and the expressed will of Congress may constitutionally be applied to these trusts.

Any doubt which might have existed on this question is certainly removed by this Court's decision in *Third National Bank* v. *White,* decided December 19, 1932, No. 202, October Term, 1932, on the authority of *Tyler* v. *United States,* 281 U. S. 497, 504, 505, and *Gwinn* v. *Commissioner, supra.* The *Third National Bank case* involved a tenancy by the entirety created in 1915. This was an irrevocable disposition of property prior to the enactment

---

which he declared, "I hereby revoke said Deed and terminate the interests of all persons therein, * * *" and directed the trustee to hold the trust property as trustee "under a new Deed of Trust." (R. 46.) He then executed a complete new trust instrument, dated and executed November 27, 1926, and declaring his purpose "to create a trust." (R. 30.) This trust is the Helen Porter Davisson Trust No. 3. The trustee accepted it as a new trust and regarded the former trusts as terminated.

of any Federal estate tax law. This Court nevertheless held that the tax was properly imposed, since the decedent's death occurred after the enactment of the Revenue Act of 1924, and resulted in definite accessions to the property rights of his surviving wife. In the present case the interests which passed to the beneficiaries through death were even greater than those which devolved on the wife in the *Third National Bank case;* for there the wife obtained from the original creation of the tenancy a definite interest over which her husband had no power, and which would ripen into complete ownership of the property if she survived her husband. In the present case the beneficiaries, until the decedent's death, had no certain interest which was not at all times wholly subject to the decedent's power. At his death, and as a result of it, their interests for the first time became final, complete, and irrevocable. Under the decisions of this Court in the *Tyler, Gwinn,* and *Third National Bank cases,* this was a taxable event, and since it occurred after the enactment of the taxing statute the tax was validly imposed.

The *Third National Bank case* also disposes of the petitioners' argument that the tax is unconstitutional because when the decedent created the trusts, he "could not have foreseen the tax burden," and because "he not only divested himself of the property but he made it impossible to repossess the property either for himself or his estate." (Br. 33.) Exactly the same objections were advanced

against the taxation of the tenancy by the entirety involved in the *Third National Bank case,* and were rejected by this Court. It was just as true in the *Third National Bank case* as here that, in the petitioners' language (Br. 33), when "the statute was enacted it was beyond his power to restore either himself or his estate to a position where the tax could be paid out of the property transferred. * * * in this instance by no possibility could the property previously transferred be included among the assets from which the tax could be paid."

In any event, as we have already pointed out, there is no question of retroactivity in this case, as the transfers were taxable under Section 302 (c), a provision which was in effect before the original creation of any of the trusts.

## CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
*Solicitor General.*
G. A. YOUNGQUIST,
*Assistant Attorney General.*
SEWALL KEY,
*Special Assistant to the Attorney General.*
ERWIN N. GRISWOLD,
*Attorney.*

FEBRUARY, 1933.

# APPENDIX A

## STATUTES AND REGULATIONS INVOLVED

### STATUTES

The Revenue Act of 1926, c. 27, 44 Stat. 9, 69, 70–72, provides in part as follows:

> SEC. 301. (a) In lieu of the tax imposed by Title III of the Revenue Act of 1924, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or nonresident of the United States;
>
> * * * * *
>
> (U. S. C. App., Title 26, Sec. 1092.)
>
> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> (b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for ade-

quate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years

prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

* * * * *

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

(U. S. C. App., Title 26, Sec. 1094.)

REGULATIONS

Regulations 70 (1926 ed.), promulgated August 24, 1926, and Regulations 70 (1929 ed.), promulgated March 23, 1929, provide in part as follows:

ART. 18. * * *

* * * * *

Where there was no reservation of income or an annuity but it was intended that possession or enjoyment of the transferred property or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income or annuity was payable during the decedent's life to some one other than himself. Example: The decedent transferred property to his son, the latter to receive the income during the decedent's life or agreeing to pay the income to his mother during the decedent's life. The transfer to the son in either case is taxable.

ART. 19. *Power to change enjoyment.*— The value of property transferred, other than by a bona fide sale for an adequate and full consideration in money or money's worth, constitutes a part of the gross estate if at the time of the decedent's death the enjoyment thereof was subject to any change through a power, exercisable either by the decedent alone or in conjunction with any person, to alter, amend, or revoke.

* * * * *

# APPENDIX B

## CONGRESSIONAL COMMITTEE REPORTS

The report of the Ways and Means Committee of the House on the Revenue Bill of 1924 (House Report No. 179, 68th Cong., 1st Sess., p. 65) contains the following:

> SEC. 302 (d):
>
> By this subdivision if the decedent had the power at the time of his death to change the enjoyment of a property interest, which he had transferred, or with respect to which he had created a trust, such interest is to be included for estate tax purposes in his gross estate. Likewise, if the decedent had relinquished such a power in contemplation of death, except by a sale for a fair consideration, the property interest over which he had such a power is to be included in his gross estate.
>
> Even though the decedent has made the transfers specified in this subdivision, he has retained substantial control over the disposition of the property, through the power to change the enjoyment thereof. Such property interests should therefore fairly be taxed as part of the decedent's estate, particularly since, by virtue of his death, the substantial interest which he had has been wiped out, and to the same extent the property interest of the legal title holder, his transferee, has been increased. This provision is in accord with the principle of section 219 (g) of the bill which taxes to the grantor the income of a revocable trust.

The same language is included in the report of the Committee on Finance of the Senate (Senate Report No. 398, 68th Cong., 1st Sess., pp. 34–35).



U. S. GOVERNMENT PRINTING OFFICE: 1932

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CHARLES ELMORE

No. 466

# In the Supreme Court of the United States

OCTOBER TERM, 1932

ESTHER JACKSON PORTER, AS EXECUTRIX ET AL., PETITIONERS

*v.*

DAVID BURNET, COMMISSIONER

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF**

MERRILL S. JUNE,

*Counsel for Reginald Washburn et al., as Amicus Curiae.*

*808 Slater Building*

*Worcester, Mass.*

# INDEX


| | Page |
|---|---|
| Motion for leave to file brief as amicus curiae | 1 |
| Brief as amicus curiae | 2 |
| Preliminary statement | 2 |
| Argument | |
| I. The decedent had no interest in the trust property at his death | 4 |
| II. It is immaterial that the beneficiaries' interests could be disturbed | 5 |
| III. Other questions are involved | 7 |
| Conclusion | 8 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Brady* v. *Ham* (C.C.A. 1st) 45 F.(2d) 454 | 2, 3 |
| *Coolidge* v. *Long*, 282 U. S. 582 | 6 |
| *White* v. *Erskine* (C.C.A. 1st) 47 F. (2d) 1014 | 2 |
| *Gwinn* v. *Commissioner*, decided Dec. 5, 1932 | 6 |
| *Heiner* v. *Donnan*, 285 U. S. 312 | 4 |
| *Leach* v. *Nichols*, 285 U. S. 65 | 7 |
| *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 | 4 |
| *Saltonstall* v. *Saltonstall*, 276 U. S. 260 | 6 |
| *Shukert* v. *Allen*, 273 U. S. 545 | 6 |
| *Third National Bank & Trust Co.* v. *White*, decided Dec. 19, 1932 | 6 |
| *Tyler* v. *United States*, 281 U. S. 497 | 6 |
| *Washburn* v. *White* (D.C. Mass.) decided Nov. 29, 1932 | 3, 4, 6, 7 |
| *Y. M. C. A.* v. *Davis*, 264 U. S. 47 | 6 |
| Statutes: | |
| The Revenue Act of 1926, section 302 (d) | 3, 5, 7 |

# In the Supreme Court of the United States

OCTOBER TERM, 1932

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No. 466

ESTHER JACKSON PORTER, AS EXECUTRIX ET AL., PETITIONERS

*v.*

DAVID BURNET, COMMISSIONER

---

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

---

May it Please the Court:

The undersigned, as counsel for REGINALD WASHBURN et al., executors under the will of Charles G. Washburn, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

MERRILL S. JUNE,

*Counsel for Reginald Washburn et al., as Amicus Curiae.*

# In the Supreme Court of the United States

OCTOBER TERM, 1932

---

No. 466

ESTHER JACKSON PORTER, AS EXECUTRIX ET AL., PETITIONERS

*v.*

DAVID BURNET, COMMISSIONER

---

## BRIEF OF MERRILL S. JUNE, as AMICUS CURIAE

---

### PRELIMINARY STATEMENT

The instant case presents the question whether under Section 302 (d) of the Revenue Act of 1926, there should be included in the gross estate the value of property transferred by a decedent in trust, but subject to the power of the decedent to modify the trust except in his own favor. In 1930 this exact question was decided by the Circuit Court of Appeals for the First Circuit in *Brady* v. *Ham*, 45 F. (2d) 454, holding the value of such property was not to be included in the gross estate. In *White* v. *Erskine* (C.C.A. 1st), 47 F. (2d) 1014, decided in 1931,

where there was involved the question of the power of the decedent grantor with the consent of the trustee to make limited changes, the same court again considered Section 302 (d) and stated:

> "To hold that Congress under subdivision (d) intended under the guise of a tax on the transfer of property at death to impose a tax solely on a limited power of alteration of a trust, or a limited power of appointment under it, would be contrary, not only to the spirit of the Act, but the express terms of Sec. 301. * * * "

The Government did not seek a review of either of these decisions and these questions have since been considered settled in the First Circuit.

The District Court for the District of Massachusetts relying upon the decision of *Brady* v. *Ham*, on November 29, 1932, gave judgment for the plaintiffs in a similar suit for the refund of federal estate taxes (Law No. 5103, *Reginald Washburn* et al., *Executors* v. *White*, reported in 1933 C.C.H. Federal Tax Service, Paragraph 9018), in which the undersigned is counsel for the plaintiffs. The Government has now indicated that this decision will be appealed. Since the instant case of *Porter* v. *Burnet* will have the effect of a review of *Brady* v. *Ham* as far as the authority of the latter case is concerned and affect the pending case of *Washburn* v. *White*, counsel as amicus curiae desires to submit the following argument in support of the petitioners.

## ARGUMENT

### I

### THE DECEDENT HAD NO INTEREST IN THE TRUST PROPERTY AT HIS DEATH

As the Government conceded in its brief below, the value of the trust property cannot be included in the gross estate if the transfers were complete when made. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, as to the "five trusts" there involved; *Heiner* v. *Donnan*, 285 U. S. 312. We submit that this transfer was complete when made and an inter vivos transfer in so far as the decedent's property interest was concerned. The Government contends that the possibility of a return of the trust property to the grantor through some ingenious scheme for the termination of the trust is enough to constitute the trust property part of the decedent's estate for tax purposes. The terms of the trust provide for no such return of the property to the decedent. In fact, the express terms prohibit a return to the decedent. Where, as in this case, the reserved power is limited by excepting any alteration in the grantor's favor, and the trustee is not the grantor of the trust, such a termination as would revest the trust property in the grantor would be such a fraud on the power that the trustee as a practical matter would contest and a court of equity would prevent its accomplishment. This practical objection to the Government's argument is especially forceful in such modifications of the instant case as *Washburn* v. *White*, *supra*,

where one trustee was also one of the beneficiaries of the trust. Congress by the estate tax provisions of the Revenue Acts intended to have included in the gross estate property owned by the decedent at death, not property of others which he could have secured before his death by fraud or sharp practice. In fact this decedent cut himself off from any beneficial interest in the property. This completed his part of the transfer. The interest of any given beneficiary might be disturbed, but the grantor had finally parted with his interest in the trust property.

## II

### IT IS IMMATERIAL THAT THE BENEFICIARIES' INTERESTS COULD BE DISTURBED

Were the federal estate tax a tax on the succession to property, there might be weight attached to the fact that the beneficial interests under the trust could be modified before the decedent's death or that the interests of any one or more of the beneficiaries were in suspense, dependent, in the words of Section 302 (d), on "the exercise of a power, either by the decedent alone *or in conjunction with any person*" (Italics ours). Parenthetically, it is to be noted that interesting questions will arise where one party to the power is a trustee or beneficiary, whether the tax be an estate or a succession tax. Such lack of finality as to beneficiaries other than the decedent is of no importance in determining whether the decedent had finally parted with his interest in

the property. But of great importance is the question, whether the Government seeks in the instant case to erase the distinction between the estate tax and the succession tax. In the Massachusetts District Court in *Washburn* v. *White*, its attorneys argued (page 10 of their brief) that "The Federal estate tax is an excise imposed upon the privilege of directing the course of succession to property." Certainly in 1928 when this Court decided *Saltonstall* v. *Saltonstall*, 276 U. S. 260, this was not the accepted view of this Court. In that case the Massachusetts succession tax was held constitutional and was characterized by this Court as "a tax on the privilege of succession" in a sharply expressed distinction to the federal estate tax "on the privilege of transmission." It seems probable that had the tax there involved been an estate tax, it would have been invalidated. The nature of the estate tax has been defined many times by this Court. See *Y. M. C. A.* v. *Davis*, 264 U. S. 47; *Shukert* v. *Allen*, 273 U. S. 545; *Coolidge* v. *Long*, 282 U. S. 582. The most recent decisions of this Court indicate no change from the view that death must be the occasion of the passage of the property rights *from the decedent* in order to give a basis for the imposition of the estate tax on those property rights. *Tyler* v. *United States*, 281 U. S. 497; *Gwinn* v. *Commissioner*, decided December 5, 1932; *Third National Bank and Trust Company* v. *White*, decided December 19, 1932. In these cases, the decedent had definite property rights

for his own benefit which shifted from him at death. Counsel has, of course, this distinction between estate and succession taxes constantly before him in his practice in Massachusetts where it has been well established for years. See *Leach* v. *Nichols*, 285 U. S. 165, and Massachusetts cases cited in the opinion. If such cases as the Saltonstall case are still authority, it would seem to follow that any argument by the Government seeking to erase this distinction and to sustain this tax on the ground that the decedent retained a right to direct the course of succession to his property is unsound. The federal tax is not upon such a right. It is an excise tax on the transfer *from* the decedent, and whether the beneficiaries' interests could be disturbed is immaterial.

## III

### OTHER QUESTIONS ARE INVOLVED

Counsel is not unmindful that there are other questions involved. In the instant case, and in *Washburn* v. *White*, the transfers were made before the enactment of Section 302 (d) and before the similar provisions of prior Revenue Acts. Neither transfer was in contemplation of death nor in close proximity to death and the reserved power in each case, whatever its value at decedent's death, was not a power to make "any change" in an unlimited sense. The sub-paragraph (d) contains two sentences of ambiguous and difficult construction. Counsel for the petitioners and for the Government

in the instant case deal with these serious questions, but the undersigned counsel desires to emphasize particularly by this brief the distinction heretofore established between estate and succession taxes, which he submits should be upheld in this case.

## CONCLUSION

The judgment of the Circuit Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

MERRILL S. JUNE,

*Counsel for Reginald Washburn et al., as Amicus Curiae.*

FILE COPY

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 466.

ESTHER JACKSON PORTER, AS EXECUTRIX, AND RICHARD L. DAVISSON, AS SURVIVING EXECUTOR, OF THE WILL OF WILLIAM H. PORTER, DECEASED, *Petitioners,*

*against*

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FILED BY LEAVE OF COURT.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932

ESTHER JACKSON PORTER, as Executrix, and RICHARD L. DAVISSON, as Surviving Executor, of the Will of WILLIAM H. PORTER, deceased,
Petitioners,

AGAINST

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FILED BY LEAVE OF COURT

This brief is directed solely to the question of the proper *construction* of Section 302(d) of the Revenue Act of 1926. We believe there are no less, and no more, than four possible constructions of this statute, viz:

The words "any change" may mean

I. Any change however slight;

II. Any change without limitation, that is, the word "any" is a synonym for "every";

III. Any change whereby the interests of the beneficiary may be *substantially* affected, regardless of effect upon the grantor;

IV. Any change whereby the grantor can secure to himself economic enjoyment from the trust property.

The first two constructions are literal. The last two involve limitations which are not specifically expressed. Constructions I and II, if constitutional, would render the trusts taxable. Under Constructions II and IV, they would be excluded from the gross estate.

## CONSTRUCTION I

**The words "any change" mean any change however slight.**

It is respectfully submitted that this construction is not tenable. Carried to its logical conclusion it would mean that a trust could be taxed when the power to change is so limited as to be practically inconsequential, either to the grantor or to the beneficiary. Such an interpretation would render the statute arbitrary and capricious in the extreme, and probably unconstitutional. (*Knowlton* v. *Moore*, 178 U. S. 41, 76, 77; *Barclay* v. *Edwards*, 267 U. S. 442, 450; *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1.)

A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score. (*Panama Railroad Co.* v. *Johnston*, 264 U. S. 375, 390; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *Lewellyn* v. *Frick*, 268 U. S. 238.)

Therefore, we submit, this literal but narrow and harsh construction should not be adopted. There are certainly other interpretations which are more reasonable.

## CONSTRUCTION II

**The words "any change" mean any change without limitation, that is, the word "any" is a synonym for "every".**

This likewise is a literal interpretation. It will scarcely be disputed that "any" is sometimes used as a synonym for "every". Hence, the statute is open to the charge of being ambiguous, and the rule of resolving doubt in favor of the taxpayer immediately suggests itself. (*Gould* v. *Gould*, 245 U. S. 151; *United States* v. *Merriam*, 263 U. S. 179.)

It is noteworthy that this construction would square with expressions of this Court as to the proper scope of the Federal estate tax (*Chase National Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Company*, 278 U. S. 339), and, being literal, it might well come within the rules applicable to the interpretation of the language of taxing statutes laid down in *Crooks* v. *Harrelson*, 282 U. S. 55.

## CONSTRUCTION III

**The words "any change" mean any change whereby the interests of the beneficiary may be substantially affected, regardless of effect upon the grantor.**

Any interpretation, except Constructions I and II, requires reading something into the statute, some qualification or limitation which is not specifically expressed.

Assuming Construction I is unsound, we respectfully submit the only construction which is at all reasonable and which favors the Commissioner's position is Construction III. In order to justify this interpretation, however, we submit there must be a clear indication that the statute was intended to be so construed.

Examining the evidence as to intention, there would seem to be nothing to support this construction and ample grounds for its rejection. Consider that the whole scheme of the Federal estate tax law is that of an estate tax and not a succession tax. It is not lightly to be assumed that this subdivision of the statute was intended to impose an excise with respect to the exercise of a privilege (right to succession) which is the converse of the privilege (right to transfer) with respect to the exercise of which the balance of the statute imposes an excise.

Any doubt should not survive consideration of the fact that the framers of the statute in proposing its adoption clearly indicated they had in mind the situation of a *revocable* trust.*

---

* Ways and Means Committee Report to the House of Representatives, 68th Congress, Report 179, p. 65, recommending the enactment of Section 302(d) in the Revenue Act of 1924.

This interpretation would result in the imposition of a transfer tax on the estate measured by property which, neither in a legal nor a practical sense, constitutes part of the estate. As so construed, the statute is so arbitrary and capricious as to make the question of constitutionality a very lively issue. It would therefore seem in order to invoke against this interpretation the rule that a construction which raises grave doubts as to constitutionality is, if possible, to be avoided. (*Panama Railroad Co.* v. *Johnston, supra; United States* v. *Jin Fuey Moy, supra; Lewellyn* v. *Frick, supra.*)

## CONSTRUCTION IV

**The words "any change" mean any change whereby the grantor can secure to himself economic enjoyment from the trust property.**

This, we respectfully submit, is the proper construction. It is in harmony with the theory of the statute, with the expressed views of the draftsmen of the law, and with the statements of this Court from *Knowlton* v. *Moore*, 178 U. S. 41, to *Heiner* v. *Donnan*, 285 U. S. 312.

It does not subject the statute to the danger of unconstitutionality nor does it condemn it to the rigidity of literalness, with consequent absurdities when applied to particular cases. Instead, it permits of a flexibility which will be an adequate safeguard against capricious results. Finally, it meets the rule of construction in favor of the taxpayer.

It may be suggested that in view of *Reinecke* v. *Northern Trust Company*, this interpretation produces the result that

Section 302(d) does not enlarge upon Section 302(c), whereas the existence of the two sections indicates an intention that the one should cover cases not affected by the other. The answer to this is that until the Supreme Court's decision the lower courts had held that a revocable trust was not taxable under Section 302(c). [*Reinecke* v. *Northern Trust Company*, (C. C. A. 7) 24 F. (2) 91; *Stark, et al.* v. *United States*, (D. C.) 24 F. (2) 237.] As the draftsmen of Section 302(d) expressly said, that Section was intended to tax revocable trusts. *After* Section 302(d) was passed, the Supreme Court (*Reinecke* v. *Northern Trust Company*, 278 U. S. 339) held revocable trusts were taxable under Section 302(c). In view of this order in the development of the case and statutory law, we submit the passage of Section 302(d) does not indicate that Congress thereby intended to go further than *Reinecke* v. *Northern Trust Company*.

The Court is urged to adopt Construction IV.

Respectfully submitted,

J. DuPratt White,
as *amicus curiæ*.

White & Case,
14 Wall Street,
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*of Counsel*.

# SUPREME COURT OF THE UNITED STATES.

No. 466.—October Term, 1932.

Esther Jackson Porter, as Executrix, and Richard L. Davisson, as surviving Executor of the Estate of William H. Porter, Deceased, Petitioners,
*vs.*
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 13, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

The question presented is whether, for the purpose of determining the tax liability of the estate of the deceased, § 302 (d) of the Revenue Act of 1926,[1] requires that there shall be included in the value of the gross estate certain bonds that he had transferred in trust.

October 18, 1918, and again on February 1, 1919, decedent transferred to the Bankers Trust Company certain bonds for the benefit of his daughter and her son. Contemporaneously he made similar transfers of bonds to the same trustee for the benefit of his son and his son's daughter. November 27, 1926, in order to make provision for two children of his daughter born after the creation of these trusts, he sent the trust company letters purporting to revoke the trusts of which she was a beneficiary, to terminate the interest of all persons therein and to direct it to deliver the principal and income to itself as trustee according to a new deed then delivered. Each of the five trust agreements included provisions governing the management, investment, and disposition of principal and income, and contained a paragraph reserving to the donor power at any time to alter or modify the indenture and any

[1] 44 Stat. 71. 26 U. S. C., § 1094 (d).

or all of the trusts in any manner but expressly excepting any change in favor of himself or his estate.[2]

Deceased died November 30, 1926. The Commissioner of Internal Revenue included in the gross estate the value of the property described in the last deed and petitioners sought redetermination. The Board of Tax Appeals, because of the reserved power to alter and amend, held § 302 (d) applied, and included the corpus of all the trusts in the gross estate. 23 B. T. A. 1016. The Circuit Court of Appeals affirmed that ruling. 60 F. (2d) 673. Its decision being in conflict with that of the Circuit Court of Appeals for the First Circuit in *Brady* v. *Ham*, 45 F. (2d) 454, and that of the Court of Appeals of the District of Columbia in *Cover* v. *Burnet*, 53 F. (2d) 915, we granted a writ of certiorari. 287 U. S. —.

By the trust agreements, decedent divested himself of all interest in the bonds and, subject only to the reserved power, transferred full title to the trustee and beneficiaries. The reservation is broad; evidently he intended to be free at any time and from time to time to alter or modify the disposition of the property as he might see fit, subject to the restriction above mentioned. The power did not

[2]Paragraph tenth in each of the transfers is as follows:

"Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the trustee, or its successor, modify or alter in any manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest, or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interest of third parties may be concerned."

amount to an estate or interest in the property. It was much like, and for the purposes of this case may be deemed the substantial equivalent of, a general power of appointment by will. Cf. *United States* v. *Field*, 255 U. S. 257, 263. *Patterson* v. *Lawrence*, 83 Ga. 703, 707. *Clapp* v. *Ingraham*, 126 Mass. 200.

The Act, § 301 (a), imposes a tax "upon the transfer of the net estate of every decedent". The net estate as there used does not mean an amount to be ascertained as such under any general rule of law or under statutes governing the administration of estates, but is the gross estate as specifically defined in § 302 less deductions permitted by § 303. The former section declares that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—(a) To the extent of the interest therein of the decedent at the time of his death."

(b) To the extent of any interest therein of the surviving spouse as or in lieu of dower or curtesy. (c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise in contemplation of or intended to take effect in possession or enjoyment at or after his death.

(d) "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke. . . ."

(e) To the extent of the interest therein held by decedent as a joint tenant or as a tenant by the entirety. (f) To the extent of any property passing under a general power of appointment exercised by the decedent by will or by deed in contemplation of or intended to take effect in possession or enjoyment at or after death. (g) To the extent of the amount of life insurance receivable as specified. Subdivision (h) requires the interests defined in (b) to (g) inclusive to be included whether transfer was made before or after the passage of the Act.

Petitioners contend that the only thing taxed is the transfer of the net estate at death and that property in which the decedent then held no interest or power of enjoyment must be excluded.

They rely on *Reinecke* v. *Trust Co.*, 278 U. S. 339. But that case is not in point. It involved seven trusts created by the decedent. Two were held taxable because subject to a power of revocation in him alone. In each of the others he reserved power to alter, change or modify, to be exercised in four by joint action of himself and a single beneficiary and in the remaining one by himself and a majority of the beneficiaries acting jointly. As the title was put beyond his control, we held these transfers not taxable. And petitioners assume, as held in *White* v. *Erskine*, 47 F. (2d) 1014, that (a) is a limitation upon (d) and argue that the gross estate includes property only to the extent of the "interest therein of the decedent at the time of his death" and that, as before his death he had divested himself of all title, the property so transferred is not to be included in the gross estate. But the construction thus taken for granted cannot be sustained. Subdivision (a) does not in any way refer to or purport to modify (d) and, in view of the familiar rule that tax laws are to be construed liberally in favor of taxpayers, it cannot be said that, if it stood alone, (a) would extend to the transfers brought into the gross estate by (d). *United States* v. *Field*, *supra*, 264. Moreover, Congress has progressively expanded the bases for such taxation. Comparison of § 302 with corresponding provisions of earlier Acts warrants the conclusion that (d) is not a mere specification of something covered by (a) but that it covers something not included therein. Cf. *Chase National Bank* v. *United States*, 278 U. S. 327. *Tyler* v. *United States*, 281 U. S. 497. *Gwinn* v. *Commissioner*, 287 U. S. —. *Burnet* v. *Guggenheim*, 287 U. S. —.

The net estate upon the transfer of which the tax is imposed, is not limited to property that passes from decedent at death. Subdivision (d) requires to be included in the calculation all property previously transferred by decedent, the enjoyment of which remains at the time of his death subject to any change by the exertion of a power by himself alone or in conjunction with another. Petitioner argues that, as decedent was without power to revoke the transfers or to alter or modify the trusts in favor of himself or his estate, the property is not covered by subdivision (d). But the disjunctive use of the words "alter", "modify" and "amend" negatives that contention. We find nothing in the context or in the policy evidenced by this and prior estate tax laws or in the legis-

lative history of subdivision (d) to suggest that conjunctive use of these words was intended, or that "alter" and "modify" were used as equivalents of "revoke" or are to be understood in other than their usual meanings. We need not consider whether every change, however slight or trivial, would be within the meaning of the clause. Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable. The transfers under consideration are undoubtedly covered by subdivision (d).

Petitioners contend that so construed § 302 (d) is repugnant to the due process clause of the Fifth Amendment. They insist, and we assume, that the measures taken by means of decedent's letter to the trustee and the new deed of November 27, 1926, operated merely to alter and modify but did not supersede the earlier trusts made for the benefit of his daughter and her son. They maintain that inclusion of the transfers in question would be to measure decedent's tax by property belonging to others, a thing condemned in *Heiner* v. *Donnan*, 285 U. S. 312, and *Hoeper* v. *Tax Commission*, 284 U. S. 206, and would be to tax gifts *inter vivos* that were fully consummated prior to the enactment of subdivision (d) and therefore would be confiscatory under *Nichols* v. *Coolidge*, 274 U. S. 531, and *Heiner* v. *Donnan, supra.*

They treat as without significance the power the donor reserved unto himself alone and ground all their arguments upon the fact that deceased, prior to such enactment, completely divested himself of title without power of revocation. It is true that the power reserved was not absolute as in the transfer considered in *Burnet* v. *Guggenheim, supra*, in which this court, in the absence of any provision corresponding to subdivision (d), held that the donor's termination of the power amounted to a transfer by gift within the meaning of § 319 of the Revenue Act of 1924, 43 Stat. 313. But the reservation here may not be ignored for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change

by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in § 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition. *United States* v. *Wells*, 283 U. S. 102, 116. There is no doubt as to the power of Congress so to do. *Reinecke* v. *Northern Trust Co., supra. Chase National Bank* v. *United States, supra. Tyler* v. *United States, supra*, 502. *Klein* v. *United States*, 283 U. S. 231. *Gwinn* v. *Commissioner*, 287 U. S. —.

*Judgment affirmed.*

Mr. Justice CARDOZO concurs in the result.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*